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Delegated Powers and Law Reform Committee

Legislative Consent Memorandum: delegated powers relevant to Scotland in the Employment Rights Bill



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Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meeting on 25 February 2025, the Delegated Powers and Law Reform Committee ("the Committee") considered the delegated powers that are exercisable within devolved competence in the [Employment Rights Bill](#) (as introduced) and the [Employment Rights Bill](#) (as amended) ("the Bill").
2. The Committee considered the [Legislative Consent Memorandum](#) ("LCM") for the Bill, (as introduced), dated 11 December 2024, by virtue of Rule 9B.1 of the Scottish Parliament's Standing Orders - UK Parliament Bills making provision requiring the Parliament's consent.
3. The test in 9B.1 is that a "relevant Bill" is a Bill under consideration in the UK Parliament which makes provision ("relevant provision") applying to Scotland for any purpose within the legislative competence of the Parliament, or which alters that legislative competence or the executive competence of the Scottish Ministers. Further under Rule 9B.3.3 of the Standing Orders, where the Bill that is the subject of the memorandum contains provisions conferring powers on Scottish Ministers to make subordinate legislation, the Committee shall consider and may report to the lead committee on those provisions.
4. The LCM is also being considered in terms of the Committee's wider remit contained in Rule 6.11.1(b) of the Standing Orders which provide that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills "or other proposed legislation." This definition encompasses powers to make subordinate legislation in UK Bills, where exercisable within devolved competence and the Committee and its predecessor Committee have considered powers conferred on UK Ministers in devolved areas in various Bills over the course of Sessions 5 and 6.
5. The lead committee in respect of the LCM is the Economy and Fair Work Committee

Overview of the Bill

6. The Bill was introduced by the UK Government in the House of Commons on 10 October 2024. The Bill has had its first and second readings, has been considered by the Public Bill Committee, and is now at the report stage in the Commons with the report still to be published. As the Bill is still progressing through the UK Parliament, it is subject to amendment. The Committee may therefore need to consider a further supplementary LCM in due course.
7. The stated purpose of the Bill is to amend the law relating to employment rights. This includes making provision for handling redundancies, for the treatment of workers under certain public contracts, imposing equality duties on employers in relation to equality, and about trade unions, industrial action, employers' associations and the functions of the Certification Officer.
8. The amended Bill consists of 130 clauses in 6 parts. Parts 1, 2, 4, 5, 6 and chapter 3 of part 3 extend to Scotland. The Bill makes provision on a range of matters relating to employment law, industrial relations and employer equality duties. Employment and industrial relations and equal opportunities are reserved to the UK Parliament respectively by Heads H1 and L2 of Schedule 5 to the Scotland Act 1998 ("the 1998 Act").
9. Matters reserved under Head H1 dealt with in the Bill include zero hours contracts, flexible working, statutory sick pay, family leave, unfair dismissal, fire and rehire, trade unions, and industrial action. Matters reserved under L2 include protecting staff from sexual harassment and gender pay gap action plans. In the main therefore the Bill is dealing with wholly reserved matters.
10. However, clause 25 in the Bill as introduced sought to confer a power on Ministers of the Crown to make regulations to protect workers in public sector outsourcing contracts by inserting a new section 14A into the Procurement Act 2023 ("the 2023 Act"). Clause 25 (now clause 27 in the amended Bill) has been amended by UK government amendments "Gov 59-64" and, as a result, would extend this power to Scottish and Welsh Ministers by inserting a new section 5A into the 2023 Act, thus altering the executive competence of the Scottish Ministers.
11. Public procurement is not a matter expressly reserved under the 1998 Act and therefore is regarded as being a devolved matter and within the legislative competence of the Scottish Parliament; and is governed by Scottish procurement legislation. The 2023 Act, the UK Government's post-Brexit public procurement reforms, has had limited application in relation to procurements in Scotland applying to procurements by the UK Government, UK-wide or public bodies with cross-border functions and to Scottish public authorities with reserved functions only. Therefore, the 2023 Act has not applied to the procurement activities of devolved Scottish authorities, other than when devolved Scottish authorities are awarding a contract under a reserved procurement arrangement, such as a framework agreement.
12. The Scottish Government supports the amended Bill and in its LCM has sought the consent of the Scottish Parliament to the provisions of clause 25 of the Bill as it would be amended by amendments Gov 59-64. It states in its LCM that it

recommends:

” that the Parliament in relation to the Employment Rights Bill, consents to the provisions of clause 25, on the protection of workers in public sector outsourcing, as it would be amended by amendments Gov 59-64, being considered by the UK Parliament.

13. New clause 27 replicates clause 25 as amended by amendments Gov 59-64 in their entirety; and therefore, as this amended clause alters the executive competence of Scottish Ministers, it requires Parliament's consent.

Delegated Powers

14. The UK Government has published a [Delegated Powers Memorandum \(“DPM”\)](#) to accompany the Bill as introduced. It explains in each case the purpose of the power, why a delegated power is appropriate, and the parliamentary procedure that has been selected. At the time of writing, the UK Government is yet to publish a supplementary DPM on the Bill, as amended, and therefore the purpose of the amended powers, why they are appropriate, and the parliamentary procedure that has been selected is still to be explained. The Committee has therefore relied on the explanation provided in the original DPM regarding the original power and in the Scottish Government’s LCM in considering the powers as amended.
15. As is normal for UK bills, the Scottish Government has not published a delegated powers memorandum. The Scottish Government’s views on original clause 25, if amended in line with amendments Gov 59-64, are set out in the LCM.
16. Therefore, the power which is relevant to the Committee’s remit is contained in clause 27 (formerly clause 25) of the Bill, as amended. The evolution of this power is considered under the review of relevant powers in the next section of the report.

Review of relevant powers

Old Clause 25(2) inserting new section 14A(4) into the Procurement Act 2023 - protection of transferring workers in public sector outsourcing contracts

Power conferred on: Minister of the Crown

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

17. The details of this provision and consideration of it are included for background information to the extended powers in new clause 27 below. It is the Committee's view, that this power in its original form would not meet the test to be considered as a delegated power exercisable within devolved competence. This is because this provision if inserted into the 2023 Act, similar to the existing provisions in the 2023 Act, and as explained above and below, would not have applied to the procurement activities of devolved Scottish authorities, other than when devolved Scottish authorities are awarding a contract under a reserved procurement arrangement, such as a framework agreement, as is currently the case.

Provision

18. Clause 25 of the Bill, as introduced, related to the protection of workers involved in public sector outsourcing. By inserting a new section 14A into the 2023 Act, it provided powers for Ministers of the Crown to make regulations and a code of practice. The regulations and the code were to set out what public bodies awarding such contracts should do to ensure that workers transferring from the employment of a contracting authority to the employment of a supplier to work on a relevant outsourcing contract are treated no less favourably following that transfer, and that other workers of the supplier are treated no less favourably than those transferring workers.
19. New section 14A(4) provided that a Minister of the Crown may by regulations set out provisions that should be included in such contracts for that purpose; and new section 14A(5) provided that a Minister of the Crown must produce a code of practice in relation to this.
20. New section 14A(6) set out that contracting authorities would be bound to take all reasonable steps to ensure that provision specified in such regulations is included in relevant contracts and that such contractual provision is complied with, and to have regard to the code of practice. Clause 25 also amended the 2023 Act to provide that a failure to comply with this duty is not actionable in civil proceedings using the enforcement regime in that Act.
21. New sections 14A(7) to (9) excluded from these requirements private utilities, contracts awarded under devolved Welsh or transferred Northern Ireland procurement arrangements, devolved Welsh authorities, transferred Northern Ireland authorities, and contracts in other circumstances specified in regulations.
22. These provisions in the Bill on introduction would have extended to Scotland, but as explained above they would not have applied to the procurement activities of

devolved Scottish authorities, other than when devolved Scottish authorities are awarding a contract under a reserved procurement arrangement, such as a framework agreement, as is currently the case.

23. Amendments Gov 59 to 64 were government amendments to clause 25 of the Bill and the Scottish Government considers these relevant under rule 9B.3.3(b) of the Parliament's Standing Orders, as they would alter the executive competence of the Scottish Ministers. The Committee agrees and new clause 27, which reflects these amendments, is considered further below.

Committee consideration

24. In respect of the powers in old section 14A, the UK Government set out in the explanatory notes to the Bill that:
- ” these powers are intended to be used to set out measures to avoid the emergence of a workforce consisting of ex-public sector employees and private sector employees, with each group on different terms and conditions, commonly known as a ‘two-tier workforce’.
25. Two-tier workforces can arise because of the outsourcing of functions of public bodies where, as part of an outsourcing contract, public sector employees are transferred to a private sector employer. Where that happens, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) will generally ensure that those former public sector employees continue to enjoy the same terms and conditions they had under their public sector contracts. Private sector employees working on the same contract may not, however, benefit from comparable terms and conditions, resulting in a two-tier workforce. The power was to be used to make regulations ensuring that public bodies take steps to ensure this situation does not emerge, in circumstances where it can reasonably be avoided.
26. The UK Government states in its DPM that the power was limited as it was only exercisable in relation to contracts for services regulated by the 2023 Act, and only where these involve the transfer of staff from a public sector organisation to a private sector organisation. Also, it was only exercisable for the purposes of ensuring that transferring workers are treated no less favourably following the transfer, and that other workers of the supplier are treated no less favourably than the transferring workers and therefore a Minister exercising the power must be able to demonstrate that the regulations would have this effect.

Old Clause 25(2) inserting new section 14A(5) into the Procurement Act 2023: protection of transferring workers in public sector outsourcing contracts

Power conferred on: Minister of the Crown

Power exercised by: Code of Practice

Procedure: Code of practice laid before Parliament without further procedure

27. Again, the details of this provision and comments on it are included for background information to the extended powers in new clause 27 below. It is the Committee's view, that this power in its original form would not meet the test to be considered as a delegated power exercisable within devolved competence. This is because this provision if inserted into the 2023 Act, similar to the existing provisions in the 2023

Act and as explained above and below, would not have applied to the procurement activities of devolved Scottish authorities, other than when devolved Scottish authorities are awarding a contract under a reserved procurement arrangement, such as a framework agreement, as is currently the case.

Provision

28. Section 14A(5) placed a duty on a Minister of the Crown to publish a code of practice for the purposes of ensuring that workers transferring from public sector to private sector employment as a result of a relevant outsourcing contract would be treated no less favourably following that transfer, and that other specified workers of the supplier are treated no less favourably than those transferring workers. Contracting authorities (as defined by the 2023 Act) would be required to have regard to this code of practice where they enter into contracts outsourcing the provision of services.

Committee consideration

29. The UK Government states in its DPM that section 14A(5) was brought forward to meet the Government's manifesto commitment to reinstate the Two-Tier Code, a non-binding code of practice in place between 2005 and 2010, which sought to prevent the emergence of two-tier workforces where former public sector workers work alongside private sector workers on different, and often less favourable, terms and conditions.
30. The UK Government states that this power was to align with the regulation-making power in section 14A(4) to ensure that Ministers could set out in regulations concrete steps which contracting authorities must take to show all reasonable steps to implement when outsourcing services, and in the code of practice broader aims and outcomes which contracting authorities should work towards. By taking both a regulation-making power and a power to issue statutory guidance, in the form of a code of practice, Ministers would be able to take a nuanced, targeted and more effective approach, by both identifying required actions and outcomes, and encouraging the implementation of policies. A code of practice would also allow for the flexibility to respond to changes in employment law and practice and provide an opportunity to set out guidance on how contracting authorities should respond to regulations made.

New Clause 27(2) inserting new section 83C, of new Part 5A, into the Procurement Act 2023 – power to specify provision to be included in relevant outsourcing contracts

Power conferred on: Minister of the Crown, Scottish Ministers, Welsh Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

31. New clause 27 omits the previously proposed new section 14A, outlined above, in its entirety. Instead, it creates new sections 83A to 83F, together forming a new Part 5A of the 2023 Act.

32. The effect of new part 5A is broadly analogous to the provisions of new section 14A, which it replaces. The key difference is that new section 83A sets out that the powers to make regulations related to the protection of workers involved in public sector outsourcing, and the requirement to prepare and publish a code of practice in relation to such matters, is conferred on the Scottish and Welsh Ministers as well as Ministers of the Crown.
33. Scottish Ministers' powers may only be used for the purpose of regulating devolved Scottish authorities or procurement under a devolved Scottish procurement arrangement. This does not apply to persons referred to in regulation 4(1)(b) of the Utilities Contracts (Scotland) Regulations 2016. This is equivalent to the "private utilities" exemption in the 2023 Act.
34. Further, when devolved Scottish authorities are engaged in a joint procurement in which a reserved or Welsh authority is the lead authority, or when they are using reserved or devolved Welsh centralised procurement arrangements, the Scottish Ministers' regulations and code of practice will not apply. There is similar provision in relation to transferred Northern Ireland procurement arrangements.
35. The powers conferred on Ministers of the Crown and Welsh Ministers in relation to devolved Scottish authorities are that these powers may only be used for the purpose of regulating devolved Scottish authorities, where those devolved Scottish authorities are using reserved or devolved Welsh joint or centralised procurement arrangements.
36. New section 83B defines "a relevant outsourcing contract" to include contracts regulated by the Scottish procurement legislation.
37. New section 83C is the power to make regulations specifying provision to be included in a relevant outsourcing contract and replicates the provisions of previous section 14A(4). In carrying out the outsourcing contract, the contracting authority must take all reasonable steps to include provisions specified in the regulations in the contract; and take all reasonable steps to ensure that such provisions included in the contract are complied with. A failure to comply with this duty is not actionable in civil proceedings using the enforcement regime in the 2023 Act.
38. New section 83D concerns the code of practice to be published by Ministers and replicates the provisions of previous section 14A(5). New section 83E provides interpretative provisions, whilst new section 83F provides an explicit power for Scottish Ministers to amend sections 83A, 83B or 83E in consequence of a modification of Scottish procurement legislation. The 83D and 83F powers are considered further below.
39. The provisions in new clause 27 which confer powers on the Scottish Ministers therefore alter the executive competence of the Scottish Ministers. It is for these reasons that an LCM is required for these provisions.

Committee consideration

40. As noted above, the UK Government has stated in its DPM that the reasons for taking the section 14A powers was to fulfil their manifesto commitment regarding two-tier workforces and to re-instate the previous two-tier code withdrawn by a previous UK Government in 2010

41. The Scottish Government has stated in its LCM that its reasons for seeking legislative consent, on what is now new clause 27, is because it has sought to use public procurement to drive up fair work standards, including the option to pay at least the real Living Wage to workers involved in public contracts. The importance of Fair Work First is recognised in its Public Procurement Strategy for Scotland.
42. The Scottish Government also states that it recognises that its ability to act in this area is constrained by the devolution settlement. Whilst public procurement is devolved, matters relating to employment and industrial relations are reserved by Section H1 of Schedule 5 of the 1998 Act. The Scottish Government therefore welcomes the intention of the new UK Government to address this issue of two-tier workforces in outsourcing contracts, recognising that it would not be within the competence of the Scottish Parliament to legislate to confer these powers on Scottish Ministers; and because this is consistent with the Scottish Government's approach to using public procurement to drive fair work standards.
43. It is the view of the Scottish Government that the proposed amendments would require contracting authorities to go further to promote fair work standards in the case of outsourced services. All workers in the supply chain would be entitled to be treated no less favourably than their counterparts who have transferred from the public sector. This would increase the effect of its Fair Work First policy by raising working standards for a wider range of workers than it is currently within the Scottish Government's competence to address.
44. In the context of this expedited timescale for this Bill, the Scottish Government states that there has been a good level of engagement between the UK and Scottish Governments at official level but there has not been consultation on these specific proposals. However, the Scottish Government anticipates that there would be an appropriate level of consultation and stakeholder engagement before the powers are exercised. Any forthcoming regulations would be subject to parliamentary scrutiny under the affirmative procedure.
45. The Scottish Government therefore seeks the consent of the Scottish Parliament to the provisions of clause 25 of the Bill as it would be amended by amendments Gov 59-64, now clause 27.
46. The Committee considers that this power to address the issue of two-tier workforces, with differing terms and conditions, requires to be created by the UK Government as it would not be within the devolved competence of the Scottish Parliament to do so as it relates to the reserved matter of employment terms and conditions. The power is limited in that it is designed to address the outsourcing of activities from the contracting authority to a supplier and for the protection of employees of the authority and of the supplier. It therefore does not seek to affect or interfere with further re-tendering exercises or transfers between suppliers. Further, the power is tempered by what is reasonable for the contracting authority to do in the circumstances and the exceptions; and this duty would not be subject to any enforcement provisions so does not create any civil liability for a failure to comply. The power therefore appears to be designed to influence and encourage suppliers to address the issue of two-tier workforces where it can be reasonably avoided but not necessarily to dictate terms to them. It is also noted that the Scottish Government intends to consult with stakeholders before introducing any regulations.

47. For the reasons outlined above, it is the Committee's view that it is appropriate that the power is being proposed by the UK Government as it relates to reserved matters and that it is being delegated to Scottish Ministers to exercise in respect of devolved procurement matters. The power is also clearly drafted, will operate in a balanced and a proportionate manner, and goes no further than necessary.
48. Further, as the regulations will contain the details of the obligations to be placed on contracting authorities, it is the Committee's view that it is appropriate that they receive the Parliamentary scrutiny provided by the affirmative procedure.

49. The Committee is content with the power conferred on Scottish Ministers in principle and that its exercise would be subject to the affirmative procedure.

New Clause 27(2) inserting new section 83D, of new Part 5A, into the Procurement Act 2023 – power to prepare and publish; and to amend or replace a code of practice

Power conferred on: Minister of the Crown, Scottish Ministers, Welsh Ministers

Power exercised by: Code of Practice

Procedure: Laid before respective legislatures without further procedure

Provision

50. New section 83D concerns the code of practice to be published by Ministers. It replicates the provisions of previous section 14A(5). References to “A Minister of the Crown” are replaced by references to “An appropriate authority” and it sets out explicitly that the code relates to workers of sub-contractors as well as to workers of the main contractor. This section also requires that the code published by the Scottish Ministers is laid before the Scottish Parliament; and that the contracting authority must have regard to it.

Committee consideration

51. The comments for inserted section 83C above apply similarly to the power to prepare and publish a code of practice.
52. For these reasons, it is the Committee's view that it is appropriate that the power is being proposed by the UK Government as it relates to reserved matters and that it is being delegated to Scottish Ministers to exercise in respect of devolved procurement matters. The power is also clearly drafted, will operate in a balanced and a proportionate manner, and goes no further than necessary.
53. Further, requiring that the code of practice be laid before Parliament, and that it is not subject to any further scrutiny procedure is, in the Committee's view, appropriate as the code seeks to influence and encourage the implementation of policies that contracting authorities should work towards, rather than dictate behaviours. The code would also be subject to stakeholder consultation before publication.

54. The Committee is content with the power conferred on Scottish Ministers in principle and that the code would be laid before the Scottish Parliament.

New Clause 27(2) inserting new section 83F, of new Part 5A, into the Procurement Act 2023 – power to amend sections 83A, 83B or 83E

Power conferred on: Scottish Ministers

Power exercised by: Regulations

Procedure: Affirmative

Provision

55. Inserted section 83F provides a power for Scottish Ministers to amend sections 83A – application of part 5A; 83B – relevant outsourcing contracts; and 83E – interpretation of part 5A; in consequence of a modification of Scottish procurement legislation.

Committee consideration

56. In the absence of any further explanation in the DPM or the LCM, the Committee's view is that this would be a reasonable power for Scottish Ministers to exercise as a consequence of changes to the devolved matter of public procurement; and that it is appropriate that any changes are subject to parliamentary scrutiny provided by the affirmative procedure as this procedure would apply to any changes to procurement legislation itself.

57. The Committee is content with the power conferred on Scottish Ministers in principle and that its exercise would be subject to the affirmative procedure.

