

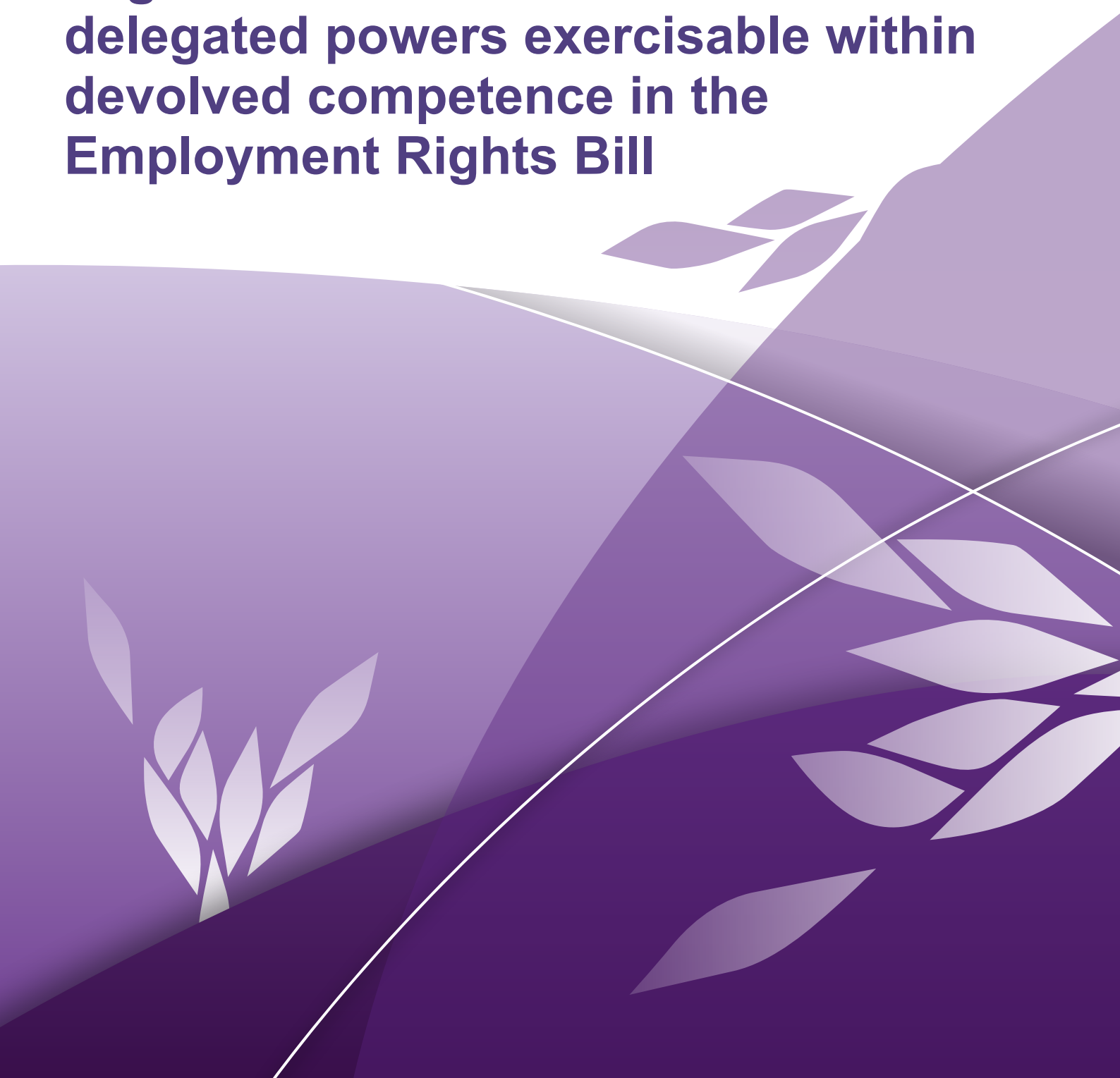


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Pàrlamaid na h-Alba

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## **Delegated Powers and Law Reform Committee**

# **Legislative Consent Memorandum: delegated powers exercisable within devolved competence 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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# Committee Membership



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Scottish Labour



**Roz McCall**  
Scottish Conservative  
and Unionist Party



**Jeremy Balfour**  
Independent

# Introduction

1. This report considers the second Supplementary Legislative Consent Memorandum lodged by the Scottish Government in respect of the Employment Rights Bill<sup>i</sup> (“the Bill”). The Committee is considering these powers under Rule 9B.3.6 of the Parliament’s Standing Orders<sup>ii</sup>.
2. The Committee previously considered a [Legislative Consent Memorandum](#) on the delegated powers exercisable within devolved competence in the [Employment Rights Bill](#) (as introduced, dated 10 October 2024) and the [Employment Rights Bill](#) (as amended, dated 27 January 2025), at its meeting on 25 February 2025. These delegated powers were in respect of avoiding, where possible, the creation of a two-tier workforce when outsourcing services from a public body to a private provider. A [Committee Report](#) was subsequently produced on 4 March 2025 in which the Committee indicated it was content with the powers conferred on the Scottish Ministers in the Bill.
3. The Committee subsequently considered a [Supplementary Legislative Consent Memorandum](#) (“sLCM”) dated 3 April 2025 for the Bill, which conferred additional powers on the Scottish Ministers, in connection with the pay and conditions of social care workers. A [Committee Report](#) was produced on 14 May 2025, in which the Committee indicated it was content with those powers.
4. The Scottish Government has now lodged a [second Supplementary Legislative Consent Memorandum](#) (second sLCM”), dated 14 August 2025. This second sLCM recommends consent for amendments tabled on 7 July 2025 to clauses 44 to 46, and 49, which the committee considered in its report of 14 May 2025. The amendments were accepted in the House of Lords and the amended Bill has since been published<sup>iii</sup>. In this report, the Committee refers to that version of the Bill, as it is the most recent<sup>iv</sup>.
5. The lead committee in respect of the sLCM is the Health, Social Care and Sport Committee.

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<sup>i</sup> As amended on Report in the House of Lords, 23 July 2025

<sup>ii</sup> Rule 9B.3.6 provides that in any case where the Bill that is the subject of a legislative consent memorandum contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Delegated Powers and Law Reform Committee shall consider and may report to the lead committee on those provisions.

<sup>iii</sup> 23 July 2025

<sup>iv</sup> The Committee has footnoted the previous clause numbers for ease of reference, as the previous numbering is used in the sLCMs and the Supplementary Delegated Powers Memorandum.

## The Bill

6. The Bill was introduced by the UK Government in the House of Commons on 10 October 2024. It completed Report stage in the Lords in July 2025 and will progress to 3<sup>rd</sup> Reading on 3 September 2025.
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 163 clauses in 6 parts and 12 schedules. Parts 1, 2, 4, 5, 6 and chapters 2 and 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. As with the previous sLCM, this second sLCM relates to the provisions on Social Care Negotiating Bodies (Negotiating Bodies), which are included within Chapter 2 of Part 3 of the Bill. Six amendments tabled on 7 July 2025 by the UK Government seek to adjust the provisions in that Chapter by making further provision in relation to powers of the appropriate authorities to make regulations in respect of the Negotiating Bodies for Scotland, England and Wales.
10. The second sLCM explains that the regulation making powers, and these amendments to those powers, fall within the reserved scope of employment rights and duties and industrial relations (Head H1 of Schedule 5 of the Scotland Act 1998). Chapter 2 of Part 3 of the Bill gives the Scottish Ministers regulation making powers in relation to the Negotiating Body for Scotland, thereby altering the Scottish Ministers' executive competence by conferring powers in relation to matters reserved under Head H1. The amendments tabled on 7 July 2025 make changes to these regulation making powers, thereby further altering the executive competence of the Scottish Ministers. The Scottish and UK Governments agree that the effect of the six amendments is to alter the executive competence of the Scottish Ministers and therefore require the Scottish Parliament's consent.
11. The Scottish Government supports the Bill as further amended and in its second sLCM has sought the consent of the Scottish Parliament to the amended provisions of this Chapter of the Bill, insofar as they relate to Scotland. It states:

” These amendments make further provision to ensure fair treatment for social care workers in Scotland by providing that any agreement made by the Social Care Negotiating Body for Scotland, or regulations made by the Scottish Ministers where an agreement is not reached, cannot adversely affect a person's terms and conditions of employment.

This aligns with the Scottish Government's approach to supporting pay and conditions within the social care sector, and would ensure alignment with wider UK levels of pay and conditions and employment policies.

## Delegated Powers

12. The UK Government has published a Supplementary [Delegated Powers Memorandum](#) (“DPM”) in relation to the amendments tabled on 7 July 2025. As is normal for UK bills, the Scottish Government has not published a delegated powers memorandum. The Scottish Government’s views are set out in the SLCM.
13. The Committee has therefore relied on the explanation provided in the Supplementary DPM and the Scottish Government’s second sLCM in considering the powers as amended.

# Review of relevant powers

## Clause 49(2)<sup>v</sup> : Power to give effect to the Negotiating Body's agreements

### Power conferred on: Scottish Ministers

### Power exercised by: Regulations

### Parliamentary Procedure: Negative

### Provision

14. Clause 49(2)<sup>vi</sup> confers a power on the Scottish Ministers<sup>vii</sup> to make regulations ratifying an agreement reached by the Negotiating Body for Scotland (in full or in part). The effect of ratification as set out in clause 50<sup>viii</sup> is that the detail contained in the agreement will take effect as terms and conditions of the relevant social care worker's employment. If the agreement relates to remuneration, the social care worker will have to be paid in accordance with that agreement. Any existing terms or conditions in the social care worker's contract that are inconsistent with the terms of a ratified agreement will cease to have effect. Ratifying regulations made under this clause can have retrospective effect.
15. Clause 50 has been amended to provide that these requirements for the social care worker's terms and conditions to mirror those of the agreement do not apply if to do so would alter a term or condition of the social care worker's employment to their detriment. The amendments also provide that an agreement does not prevent an employer from offering more favourable terms and conditions than those provided for by the agreement.

### Committee consideration

16. The Supplementary DPM explains that the amendment to clause 50 limits the effect of regulations made under clause 49(2). It states that:
  - ” these limitations provide a guarantee that social care workers will only see improvements to their pay and terms and conditions as a result of the fair pay agreement process established under this chapter of the Bill. They also ensure that employers, through collective bargaining at the local level or otherwise, can offer even better pay and terms and conditions to reward their workers and attract new recruits. These improvements will in turn help to tackle the recruitment and retention crisis in the social care sector.
17. The second sLCM is supportive of the amendments as they affect the Scottish Ministers' executive competence to make regulations giving effect to agreements submitted by the Negotiating Body. The second sLCM states that the amendments:

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**v Formerly clause 43(2)**

vi Formerly clause 43(2)

vii With the agreement of the Secretary of State (clause 44(2))

viii Formerly clause 44

” ensure that the effect of an agreement of a Social Care Negotiating Body cannot be to alter a person’s terms and conditions of employment to make the person worse off and does not prevent an employer from offering more favourable terms and conditions than those provided for by the agreement.

18. The power in clause 49(2) is otherwise unchanged from when the Committee first considered it. The justification for the choice of negative procedure also remains the same. The Committee was content with the power and the parliamentary procedure, for the reasons set out in its report dated 14 May 2025<sup>ix</sup>.
19. Given the limited nature of the amendments to the power, the Committee is accordingly similarly content.

**20. The Committee is content with the amended power conferred on the Scottish Ministers and that its exercise would be subject to the negative procedure.**

**Clause 51(2)<sup>x</sup> : Power to make provision in cases where the Negotiating Body is unable to reach an agreement**

**Power conferred on: Scottish Ministers**

**Power exercised by: Regulations**

**Parliamentary Procedure: Affirmative**

**Provision**

21. Clause 51(2)<sup>xi</sup> confers a power on the Scottish Ministers<sup>xii</sup> to set out in regulations provision for a matter which the Negotiating Body has failed to come to an agreement about. As with ratifying regulations made under clause 49(2) and discussed above, terms and conditions set out in these regulations will take effect as terms and conditions of the relevant social care worker’s employment. If the regulations relate to remuneration, the social care worker will have to be paid in accordance with that regulation. They can also have retrospective effect.
22. As with clause 50, clause 51 has been amended to provide that where the Scottish Ministers make regulations about a matter which the Negotiating Body has been unable to reach agreement on, the regulations do not have the effect of altering a person’s terms and conditions of employment to make the person worse off. Similarly, they do not prevent an employer from offering more favourable terms and conditions than those provided for by the regulations.

**Committee consideration**

23. The Supplementary DPM explains that the amendments to clause 51 limit the effect

ix At paragraphs 60-63

x Formerly clause 45(2)

xi Formerly clause 45(2)

xii With the agreement of the Secretary of State (clause 44(2))

of regulations made under the power in clause 51(2)<sup>xiii</sup>. Once again, it states that:

” these limitations provide a guarantee that social care workers will only see improvements to their pay and terms and conditions as a result of the fair pay agreement process established under this chapter of the Bill. They also ensure that employers, through collective bargaining at the local level or otherwise, can offer even better pay and terms and conditions to reward their workers and attract new recruits. These improvements will in turn help to tackle the recruitment and retention crisis in the social care sector.

24. The second sLCM is supportive of the amendments as they affect the Scottish Ministers’ executive competence to make regulations specifying terms and conditions for affected social care workers, where the Negotiating Body has been unable to reach an agreement. As before, this is on the basis that the amendment:

” ensures that these regulations cannot adversely affect an individual’s existing employment terms and conditions, and they do not prevent employers from offering terms that are more favourable than those set out in the regulations.

25. The power in clause 51(2) is otherwise unchanged from when the committee first considered it. The justification for the choice of the affirmative procedure also remains the same. The Committee was content with the power and the parliamentary procedure, for the reasons set out in its report dated 14 May 2025<sup>xiv</sup>.

26. Given the limited nature of the amendments to the power, the Committee is accordingly similarly content.

**27. The Committee is content with the amended power conferred on the Scottish Ministers and that its exercise would be subject to the affirmative procedure.**

**Clause 52<sup>xv</sup> : Power to make provision about issuing codes of practice and guidance**

**Power conferred on: Scottish Ministers**

**Power exercised by: Regulations**

**Parliamentary Procedure: Affirmative**

**Provision**

28. This clause confers a power on the Scottish Ministers<sup>xvi</sup> to make regulations about the issuing of guidance and codes of practice in relation to agreements submitted by the Negotiating Body, or in relation to regulations made by the Scottish Ministers under clause 51 in cases where the Negotiating Body is unable to reach an agreement. Such regulations can include provision about the consequences of non-

<sup>xiii</sup> Formerly clause 45(2)

<sup>xiv</sup> At paragraphs 66-69

<sup>xv</sup> Formerly clause 46

compliance with the guidance or codes of practice.

29. The amendment to clause 52 provides that where such regulations make provision about the consequences of a failure to comply with a duty imposed in relation to the guidance or code of practice, the regulations must provide for the guidance or code of practice to be laid before the Scottish Parliament. The regulations must also specify the procedure for laying the guidance or code of practice before the Parliament.

### **Committee consideration**

30. When the Committee first considered this power, it was content that it was necessary and proportionate, and that the affirmative procedure was appropriate to ensure parliamentary oversight and approval of codes of practice or guidance related to agreements submitted by the Negotiating Body.
31. The effect of the amendment is to provide for additional parliamentary oversight in circumstances where failure to comply with guidance or a code of practice gives rise to statutory consequences. It does so by requiring the guidance or code itself to be laid before the Parliament.
32. The power is otherwise unchanged and its exercise remains subject to the affirmative procedure. As such, the Committee is content.

- 33. The Committee is content with the amended power conferred on the Scottish Ministers and that its exercise would be subject to the affirmative procedure.**

