

Legislative Consent Memorandum

Employment Rights Bill

Background

1. This memorandum has been lodged by Shona Robison MSP, Cabinet Secretary for Finance and Local Government, in accordance with Rule 9B.3.1(c) of the Parliament's standing orders. It is supported by Ivan McKee MSP, Minister for Public Finance.

2. The Employment Rights Bill was introduced by the UK Government in the House of Commons on 10 October 2024. Relevant government amendments were tabled on 26 November 2024. The Bill is available on the UK Parliament website at [Employment Rights Bill - Parliamentary Bills - UK Parliament](#).

Content of the Bill

3. The Bill makes provision on a range of matters relating to employment law. Employment and industrial relations are reserved to the UK Parliament by Section H1 of Schedule 5 to the Scotland Act 1998.

4. Such matters dealt with by the Bill include in relation to:

- Zero hours contracts – introducing a right to reasonable notice of shifts and to be offered a contract with guaranteed hours, reflecting hours regularly worked.
- Flexible working – requiring employers to justify the refusal of flexible working requests.
- Statutory sick pay – removing the three-day waiting period (so employees are eligible from the first day of illness or injury) and the lower earnings limit test for eligibility.
- Family leave – removing the qualifying period for paternity leave and ordinary parental leave (so employees have the right from the first day of employment), and expanding eligibility for bereavement leave.
- Protection from harassment – expanding employers' duties to prevent harassment of staff.
- Unfair dismissal – removing the two-year qualifying period (so employees are protected from unfair dismissal from the first day of employment), subject to a potential probationary period.
- Fire and rehire – making it automatically unfair to dismiss workers because they refuse to agree to a variation of contract.
- Sectoral collective bargaining – reintroducing the School Staff Negotiating Body and creating an Adult Social Care Negotiating Body, which could determine pay and other terms and conditions for workers in these sectors.

- Trade unions – introducing rights for trade unions to access workplaces, and repealing the Strikes (Minimum Service Levels) Act 2023 and most provisions of the Trade Union Act 2016.
- Enforcement – bringing together powers of existing labour market enforcement bodies, along with some new powers, under the Secretary of State and enforcement officers.

Provisions which require the consent of the Scottish Parliament

5. Clause 25 of the Bill, as introduced, relates to the protection of workers involved in public sector outsourcing. By way of inserting a new section 14A into the Procurement Act 2023, it provides powers for Ministers of the Crown to make regulations and a code of practice setting out what public bodies awarding such contracts should do to ensure the equal treatment of different groups of workers.

6. Subsections (1) to (3) of new section 14A define a ‘relevant outsourcing contract’ as a contract meeting two conditions. First, that the contract (or a framework for the award of such a contract) is for the supply of services which include the performance of functions that are or have previously been performed by the contracting authority. Second, that those functions are, or are expected to be, performed by workers who were employed by the authority, but whose employment transferred to the supplier.

7. It provides, at subsection (4) of new section 14A, that a Minister of the Crown may by regulations set out that provisions should be included in such contracts which are for the purpose of ensuring that transferring workers are treated no less favourably as workers of the supplier than they were as workers of the contracting authority, and that workers of the supplier who are not transferring workers are treated no less favourably than those transferring workers. It also provides, at subsection (5) of new section 14A, that a Minister of the Crown must produce a code of practice in relation to this.

8. Subsection (6) of new section 14A sets 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, take all reasonable steps to ensure that such contractual provision is complied with, and have regard to the code of practice.

9. Subsections (7) to (9) of new section 14A exclude 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.

10. Subsection (3) of clause 25 amends the Procurement Act 2023 to provide that a failure to comply with this duty is not actionable in civil proceedings using the enforcement regime in that Act.

11. Subsection (4) of clause 25 provides that regulations made using these powers are subject to the affirmative procedure.

12. These provisions in the Bill on introduction will extend to Scotland, but they will not apply 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 provided for by subsection (5) of clause 25.

13. The UK Government sets 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’”.

14. Amendments Gov 59 to Gov 64 are government amendments to clause 25 of the Bill which are considered relevant under rule 9B.3.3(b) of the Parliament’s Standing Orders, as they would alter the executive competence of the Scottish Ministers.

Amendment Gov 59

15. Amendment Gov 59 omits the proposed new section 14A, outlined above, of the Procurement Act 2023 in its entirety. It seeks instead to create new sections 83A to 83F, together forming a new Part 5A of that Act.

16. The effect of new Part 5A of the Procurement Act 2023 is broadly analogous to the provisions of new section 14A, which it replaces. The key difference is that the power to make regulations, 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. This is set out in new section 83A.

17. The powers of Ministers are also limited by the provisions of 83A. As set out in new section 83A(4)(a), the Scottish Ministers’ powers may only be used for the purpose of regulating devolved Scottish authorities or procurement under a devolved Scottish procurement arrangement. A devolved Scottish procurement arrangement is defined in section 114(4) of the Procurement Act 2023 as one where:

- (a) the framework or similar arrangement was awarded by a devolved Scottish authority,
- (b) the dynamic market or similar arrangement was established by a devolved Scottish authority,
- (c) the centralised procurement authority or equivalent body is a devolved Scottish authority, or
- (d) a devolved Scottish authority was designated the lead authority in respect of the procedure or selection process.

18. This means that the regulations made and code of practice published by the Scottish Ministers may be made applicable to almost all relevant procurement activities of devolved Scottish authorities.

19. As set out in 83A(6)(b), this does not apply to persons referred to in regulation 4(1)(b) of the Utilities Contracts (Scotland) Regulations 2016. Such persons are bodies which are subject to those regulations, but which are not considered either to be: a

contracting authority – defined as the state, regional or local authorities, body governed by public law, or association formed by one or more such authorities or bodies; or a public undertaking – defined as a person over which one or more contracting authorities are able to exercise, directly or indirectly, a dominant influence by virtue of ownership, financial partnership or other rights. This is equivalent to the provision at 83A(6)(a) which exempts “private utilities” as defined by the Procurement Act 2023.

20. 83A(4)(b) provides that 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. 83A(6)(d) makes similar provision in relation to transferred Northern Ireland procurement arrangements.

21. The Scottish Ministers’ powers also extend to the regulation of the award of contracts under devolved Scottish arrangements made by authorities which are not devolved Scottish authorities (with the exceptions, per section 83A(6)(c) of devolved Welsh authorities listed in Schedule 1 of the Social Partnership and Public Procurement (Wales) Act 2023 – to which separate arrangements under that Act apply). In practice, such application would not be made without the agreement of the relevant administrations.

22. The powers conferred on Ministers of the Crown and Welsh Ministers in relation to devolved Scottish authorities are slightly more restricted in relation to devolved Scottish authorities. 83A(3)(a) and 5(a) set out 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.

23. Ministers of the Crown and Welsh Ministers may exercise their powers in relation to contracts awarded by reserved and devolved Welsh authorities under devolved Scottish procurement arrangements, other than where those reserved or devolved Welsh authorities are using devolved Scottish joint or centralised procurement arrangements.

24. 83B defines “a relevant outsourcing contract”. The conditions set out in new section 14A(1) to (3) are amended to reflect the inclusion in scope of contracts regulated by the Scottish procurement legislation.

25. 83C concerns the power to make regulations specifying provision to be included in a relevant outsourcing contract. This replicates the provisions of new section 14A(4), (6)(a) and (b), (7), and the definition of “specified” set out in (9). There are only two differences. First, references to “A Minister of the Crown” are replaced by references to “An appropriate authority” – a term defined to include Scottish and Welsh Ministers. Second, it is set out explicitly that the provisions to be included in relevant contracts relate to workers of sub-contractors as well as to workers of the main contractor.

26. 83D concerns the code of practice to be published by Ministers. It replicates the provisions of new section 14A(5) and (6)(c). Again, references to “A Minister of the Crown” are replaced by references to “An appropriate authority”, and it is set out explicitly that the code relates to workers of sub-contractors as well as to workers of the main contractor. 83D(3)(b) requires the code published by the Scottish Ministers to be laid before the Scottish Parliament.

27. 83E provides interpretative provisions, whilst 83F provides an explicit power for Scottish Ministers to amend 83A, 83B or 83E in consequence of a modification of Scottish procurement legislation. The term “Scottish procurement legislation” is defined in section 115(4) of the Procurement Act 2023 as meaning:

- (a) the Procurement Reform (Scotland) Act 2014,
- (b) the Public Contracts (Scotland) Regulations 2015,
- (c) the Utilities Contracts (Scotland) Regulations 2016,
- (d) the Concession Contracts (Scotland) Regulations 2016, and
- (e) any legislation which modifies or replaces that legislation (including an Act of the Scottish Parliament).

Amendment Gov 60

28. Amendment Gov 60 amends the definition of a contracting authority in the Procurement Act 2023. This definition currently excludes devolved Scottish authorities. It is amended to reflect that devolved Scottish authorities are considered contracting authorities for the purposes of new Part 5A.

Amendment Gov 61

29. Amendment Gov 61 omits provision made redundant by amendment Gov 59. New section 14A was to have been included in Part 2 of the Procurement Act 2023. Section 100 of that Act sets out that duties in its Parts 1 to 5, 7 and 8 are enforceable in civil proceedings under Part 9. The Bill as introduced sought to amend section 100 of the Procurement Act 2023 to set out that duties under new section 14A are not so enforceable.

30. As amendment Gov 59 omits new section 14A, and instead inserts a new Part 5A, which would not be subject to the enforcement provisions of Part 9, it is no longer necessary to specifically exclude these duties from the scope of section 100.

Amendment Gov 62

31. Amendment Gov 62 amends section 122 of the Procurement Act 2023 to set out the parliamentary procedure which applies to regulations made under new Part 5A. It sets out that both of the powers conferred on Scottish Ministers (to make regulation about provision to be included in relevant outsourcing contracts, and to amend sections 83A, 83B and 83E in consequence of a modification of Scottish procurement legislation) would be subject to affirmative procedure.

Amendment Gov 63

32. Amendment Gov 63 amends the interpretative provisions of the Procurement Act 2023 in relation to the definition of “appropriate authority” to reflect that for the purposes of new Part 5A this includes the Scottish Ministers.

Amendment Gov 64

33. Amendment Gov 64 amends Schedule 9A to the Procurement Act 2023, which lists the parts of that Act which are relevant to a devolved Scottish authority when using reserved procurement arrangements. It ensures new Part 5A is included in this list, as that

will be relevant to the award of contracts under joint or centralised reserved procurement arrangements.

Reasons for seeking legislative consent

34. The Scottish Government has consistently sought to use the power of public procurement to drive up fair work standards, including through updating the [Statutory guidance under the Procurement Reform \(Scotland\) Act 2014](#) (May 2022) to include a chapter to reflect policy developments such as the option to mandate payment of at least the real Living Wage to workers involved in public contracts. The importance of Fair Work First has been recognised in the [Public Procurement Strategy for Scotland](#), and a [Scottish public procurement note from April 2024](#) sets out the range of guidance which the Scottish Government has produced on such matters.

35. This has been in contrast to the UK Government in recent years. Indeed an earlier two-tier code was withdrawn by a previous UK Government in 2010.

36. However, the Scottish Government's 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 to the Scotland Act 1998. The provisions which confer powers on the Scottish Ministers in amendments Gov 59-64 therefore alter the executive competence of the Scottish Ministers. It is for these reasons that an LCM is required for these provisions.

37. The Scottish Government therefore welcomes the intention of the new UK Government to address this issue, and, recognising that it would not be within the competence of the Scottish Parliament to legislate in such a manner, to confer the powers in amendments Gov 59-64 on Scottish Ministers.

38. 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 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 help.

Consultation

39. The speed at which this Bill, and these amendments, have been introduced, means there has not been consultation on these specific proposals. In the context of this expedited timescale, there has been a good level of engagement between the UK and Scottish Governments at official level.

40. It is anticipated that there would be an appropriate level of consultation and stakeholder engagement before the powers are exercised.

Financial implications

41. The exercise of these powers may have financial implications for contractors, and for public authorities awarding contracts. These can only be properly assessed, however, in relation to any specific proposed use of those powers.

42. The UK Government has not produced an impact assessment in relation to these measures since they fall under the administrative exceptions under the Better Regulation Framework.

Post EU scrutiny

43. These provisions are not relevant to the Scottish Government's policy to maintain alignment with the EU. Whilst it is true to say that public procurement is an area which was governed by EU Directives, and the principal domestic procurement regulations in Scotland are assimilated law, the relevant provisions in this Bill are neither part of, nor incompatible with, EU law. Indeed, an earlier version of a code of practice was in place before being withdrawn by the previous UK Government.

Conclusion

44. The Scottish Government welcomes the intention of the new UK Government to address the issue of two-tier workforces in outsourcing contracts. This is consistent with the Scottish Government's approach to using the power of public procurement to drive fair work standards.

45. The Scottish Government therefore intends to seek 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.

Draft motion on legislative consent

46. The draft motion, which will be lodged by the Cabinet Secretary for Finance and Local Government, is:

“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.”

Scottish Government
December 2024

This Legislative Consent Memorandum relates to the Employment Rights Bill (UK legislation) and was lodged with the Scottish Parliament on 11 December 2024

Employment Rights Bill – Legislative Consent Memorandum

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