

Supplementary Legislative Consent Memorandum

UK Small Business, Enterprise and Employment Bill: Public Sector Exit Payments

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Deputy First Minister and Cabinet Secretary for Finance, Constitution and Economy, is:

“That the Parliament agrees that the relevant provisions of the Small Business, Enterprise and Employment Bill, introduced in the House of Commons on 25 June 2014 and subject to amendments tabled in the House of Lords on 7 January 2015, relating to the recovery of public sector exit payments, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by John Swinney, Deputy First Minister and Cabinet Secretary for Finance, Constitution and Economy, under Rule 9B.3.1 (a) of the Parliament’s standing orders. The Small Business, Enterprise and Employment Bill (“the Bill”) was introduced in the House of Commons on 25 June 2014 and passed to the House of Lords on 19 November. It entered Committee stage in the Lords on 7 January 2015. The latest version of the Bill can be found at:

<http://services.parliament.uk/bills/2014-15/smallbusinessenterpriseandemployment.html>

Content of the Small Business, Enterprise and Employment Bill

3. The Bill results from the UK Government’s “Red Tape Challenge” and aims to promote economic growth by removing what are regarded as unnecessary impediments to business. The Bill will support small businesses by cutting bureaucracy and enabling them to access finance.

4. The Bill will require UK Ministers to set and report on a deregulation target for the period of each Westminster Parliament. The Bill will also aim to reduce delays in employment tribunals, improve the fairness of contracts for low paid workers and establish a public register of company beneficial ownership. The Bill will also impose higher penalties on employers who fail to pay their staff the minimum wage and will limit excessive redundancy payments across the public sector.

5. The Bill also includes measures relating to childcare, public sector procurement and to the introduction of legislation to provide for a new statutory code and an adjudicator to increase fairness for public house tenants. These measures will only be introduced in England and Wales and will not extend to Scotland.

6. The majority of the Bill, insofar as it relates to devolved matters and would require the Parliament’s consent, was considered in a Legislative Consent

Memorandum from the Scottish Government of 8 August 2014, with the relevant Legislative Consent Motion (S4M-10756) agreed by the Parliament on 4 November 2014. That Memorandum noted that:

“Sections 140 – 142 of the Bill [as they were then] make provision around the recovery of exit payments for public servants. This was a late addition to the Bill and the Scottish Government (SG) is still in discussion with the UK Government and Scottish stakeholders on the detail of the policy and the desirability of an LCM for this provision. **If agreement is reached on the policy, the Scottish Government will lodge a supplementary LCM in due course.** If there is no agreement, the Scottish Government will ask for the provision not to extend to Scotland and for the provision to be amended accordingly.”

7. Discussions with the UK Government have now concluded on the provisions around the recovery of exit payments for public servants. Those provisions now appear as Sections 149 – 151, with a consequential amendment to section 154(1), in the Bill as introduced to the House of Lords on 19 November and subject to amendments at Lords Committee Stage. The relevant amendments were tabled in the House of Lords on 7 January 2015 and are appended to this memorandum for ease of reference.

Provisions Which Relate to Scotland

8. In respect of the recovery of public sector exit payments, the Bill, after application of the amendments in the appendix to this memorandum, makes provision which extends to Scotland and which is relevant under Chapter 9B of the Parliament’s Standing Orders. The relevant sections in the Bill are:

- **Section 149 – Regulations in connection with public sector exit payments**
- **Section 150 – Section 149(1): further provision**
- **New Clause to be inserted – Power to make regulations to be exercisable by the Treasury or Scottish Ministers**
- **Section 151 – Power of Secretary of State to waive repayment requirement**
- **Section 154 (1) – Supplementary provision about regulations**

9. Further details on the effect of these provisions and the reasons for seeking the legislative consent of the Scottish Parliament are set out below.

Reasons for seeking a legislative consent motion

10. Collectively, sections 149 to 151 and section 154(1) have a devolved purpose as, when amended, they will provide for:

- a general power for regulations to be made requiring the repayment of some or all of any qualifying exit payment in prescribed circumstances;

- the Scottish Ministers to make regulations in relation to relevant responsible public authorities who wholly or mainly exercise functions within devolved competence and whose workforces are devolved;
- the Scottish Ministers to give their consent to waive the whole or any part of a relevant exit payment, in prescribed circumstances; to give direction on waivers in cases where the waiver has been delegated to another person; and to make provision in relation to the publication of information about any waivers given;
- regulations to make certain provisions, including for: exemptions from repayment; tapering of repayment; certain duties, on an exit payee, a responsible authority and a subsequent authority; arrangements for repayment (and for preventing an exit payee taking up subsequent relevant employment until those arrangements are made); and the consequences of failure to repay;
- regulations to be made by Scottish statutory instrument and to be subject to negative procedure in the Scottish Parliament.

11. So far as these provisions concern exit payments made by a “relevant Scottish authority” (as defined in subsection (3) of the new clause), they fall within the legislative competence of the Scottish Parliament and a Legislative Consent Motion is therefore needed.

Consultation

12. All public bodies would potentially be covered by the provisions on recovery of public sector redundancy pay. This includes central government and agencies; NDPBs; Non-Ministerial Departments; the Houses of Parliament and the Scottish Parliament Corporate Body (SPCB); NHS bodies; police and fire services; further education colleges; various parliamentary commissions/commissioner and regulators; some public corporations; and local government and associated local government bodies (e.g. ports and harbours). The Treasury will exclude from future regulations made under the provision: the BBC, Ch4, S4C, the Bank of England; various public financial institutions whose assets will return to the private sector; the armed forces; and national museums for the remainder of a 4 year trial to run on a more commercial basis. The Scottish Government has decided to mirror the Treasury’s approach to scope and exclusions at this stage but will consult further on the detail and scope of future Scottish regulations in due course.

13. Public bodies in Scotland who are likely to fall within the scope of the measures have been alerted to the proposal and asked for views. In doing so, the Scottish Government has made clear that further consultation will be undertaken on the detail of any future Scottish regulations. The Deputy First Minister and Cabinet Secretary for Finance, Constitution and Economy wrote to the Presiding Officer on 18 December to draw her attention to the inclusion of the SPCB and Parliamentary commissions/commissioners in the scope of the proposed measures.

Financial Implications

14. There are no significant financial implications of these amended sections of the Bill. There will be resource costs for the Scottish Government associated with

making future Scottish regulations, but these will be budgeted for in the usual way. There may be some future administrative costs associated with the recovery of exit payments but these are likely to be minimal. There would be positive financial implications in cases where individuals are re-employed and all or part of any previous redundancy payment is recovered by the previous employing body but it is not possible to quantify that.

Conclusion

15. It is the view of the Scottish Government that it is in the best interests of the Scottish people and good governance that the relevant provisions outlined above in relation to the recovery of public sector exit payments, and which fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

SCOTTISH GOVERNMENT

January 2015

**UK SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL: AMENDMENTS
AS TABLED ON 7 JANUARY 2015 FOR LORDS COMMITTEE**

Clause 149

BARONESS NEVILLE-ROLFE

Page 139, line 5, leave out “The Treasury may by regulations” and insert “Regulations may”

Page 139, line 9, leave out “Treasury think” and insert “person making the regulations thinks”

Page 139, line 31, leave out subsection (6)

Clause 150

BARONESS NEVILLE-ROLFE

Page 140, line 1, leave out from second “a” to “or” in line 2 and insert “prescribed public sector authority”

Page 140, line 3, leave out “public sector office so prescribed” and insert “prescribed public sector office”

After Clause 150

BARONESS NEVILLE-ROLFE

Insert the following new Clause—

“Power to make regulations to be exercisable by the Treasury or Scottish Ministers

(1) The power to make regulations under section 149(1) is exercisable—

(a) by the Scottish Ministers in relation to payments made by a relevant Scottish authority;

(b) by the Treasury in relation to any other payments,

(but this subsection is subject to subsection (2)).

(2) Where the relevant Scottish authority is the Scottish Administration the power to make regulations under section 149(1) is exercisable by the Treasury (instead of the Scottish Ministers) in relation to payments made to—

(a) the holders of offices in the Scottish Administration which are not ministerial offices (read in accordance with section 126(8) of the Scotland Act 1998), and

(b) the members of the staff of the Scottish Administration (read in accordance with section 126(7)(b) of that Act).

(3) In this section “relevant Scottish authority” means an authority which wholly or mainly exercises functions which would be within devolved competence (within the meaning of section 54 of the Scotland Act 1998).

(4) Regulations under section 149(1)—

- (a) if made by the Treasury, are subject to negative resolution procedure;
- (b) if made by the Scottish Ministers, are subject to the negative procedure.”

Clause 151
BARONESS NEVILLE-ROLFE

Page 140, line 38, leave out “virtue of” and insert “regulations made by the Treasury under”

Page 140, line 38, at end insert—

“(1A) The Scottish Ministers may waive the whole or any part of any repayment required by regulations made by the Scottish Ministers under section 149(1).”

Page 140, line 42, after “regulations” insert “made by the Treasury”

Page 140, line 42, at end insert—

“() make provision for the power under subsection (1) to be exercisable on behalf of the Secretary of State by a prescribed person,”

Page 141, line 2, at end insert—

“() The exit payments regulations made by the Scottish Ministers may—

(a) make provision for the power under subsection (1A) to be exercisable on behalf of the Scottish Ministers by a prescribed person,

(b) make provision for a waiver to be given only—

(i) with the consent of the Scottish Ministers, or

(ii) following compliance with any directions given by the Scottish Ministers,

(where provision is made by virtue of paragraph (a)), and

(c) make provision as to the publication of information about any waivers given.”

Page 141, line 3, after “regulations” insert “made by the Treasury”

Page 141, line 5, leave out paragraph (a)

Clause 154
BARONESS NEVILLE-ROLFE

Page 142, line 29, after “1” insert “or 149(1)”

UK SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL: IMPACT ON EXISTING CLAUSE OF AMENDMENTS TABLED ON 7 JANUARY 2015 FOR LORDS COMMITTEE (new text in bold and underlined)

Public sector exit payments

149 Regulations in connection with public sector exit payments

(1) ~~The Treasury may by~~ Regulations **may** make provision requiring the repayment of some or all of any qualifying exit payment in prescribed circumstances (see section 150).

(2) The regulations may make such other provision in connection with qualifying exit payments as the Treasury **person making the regulations** think fit.

(3) A qualifying exit payment is a payment of a prescribed description—

(a) made to an employee of a prescribed public sector authority in consequence of the employee leaving employment, or

(b) made to a holder of a prescribed public sector office in consequence of the office holder leaving office.

(4) The descriptions of payment which may be prescribed by virtue of subsection (3) include—

(a) any payment on account of dismissal by reason of redundancy (read in accordance with section 139 of the Employment Rights Act 1996),

(b) any payment on voluntary exit,

(c) any payment to reduce or eliminate an actuarial reduction to a pension on early retirement,

(d) any severance payment or other ex gratia payment,

(e) any payment in respect of an outstanding entitlement (such as to annual leave or an allowance),

(f) any payment of compensation under the terms of a contract,

(g) any payment in lieu of notice, and

(h) any payment in the form of shares or share options.

(5) If more than one qualifying exit payment is payable to an employee or office holder the provision made in the exit payments regulations is to apply in relation to the aggregated payments.

~~(6) Exit payment regulations are subject to negative resolution procedure.~~

(7) For the purposes of this section and sections 150 and 151—

an “exit payee” is an employee or office holder to whom any qualifying exit payment is payable,

the “exit payments regulations” are regulations under subsection (1),

a “responsible authority” means an authority by which any qualifying exit payments are payable, and

“prescribed” means prescribed by the exit payments regulations.

150 Section 149(1): further provision

(1) In making any provision by virtue of section 149(1), the exit payments regulations may, in particular, require repayment where, within a prescribed period, an exit payee becomes—

(a) an employee or a contractor of a **prescribed** public sector authority, ~~prescribed by virtue of section 149(3), or~~

(b) a holder of a **prescribed** public sector office ~~so prescribed.~~

(2) Subsection (3) applies if the exit payments regulations make provision as mentioned in subsection (1).

(3) The exit payment regulations may, in particular, make provision—

(a) exempting an exit payee from the requirement to repay in the prescribed circumstances;

(b) exempting some or all of a qualifying exit payment from that requirement in the prescribed circumstances;

(c) for the amount required to be repaid to be tapered according to the time which has elapsed between an exit payee leaving employment or office and the event mentioned in subsection (1);

(d) imposing duties, in connection with a qualifying exit payment, on—

(i) an exit payee,

(ii) a responsible authority, and

(iii) a subsequent authority;

(e) as to the arrangements required to be made by an exit payee to repay to a responsible authority the amount of a qualifying exit payment required to be repaid;

(f) for preventing an exit payee from becoming an employee or a contractor, or a holder of a public sector office, as mentioned in subsection (1) until the arrangements required by virtue of paragraph (e) have been made;

(g) as to the consequences of an exit payee failing to repay the amount required to be repaid (including the dismissal of the exit payee).

(4) In subsection (3)(d)(iii) a “subsequent authority” means—

(a) in relation to an exit payee who becomes an employee or a contractor, a public sector authority of which the exit payee becomes an employee or a contractor, or

(b) in relation to an exit payee who becomes a holder of a public sector office, an authority which is responsible for the appointment.

(5) For the purposes of this section an exit payee becomes a contractor of a public sector authority if the exit payee provides services to the authority under a contract for services.

New Clause to be inserted:

Power to make regulations to be exercisable by the Treasury or Scottish Ministers

(1) The power to make regulations under section 149(1) is exercisable -

(a) by the Scottish Ministers in relation to payments made by a relevant Scottish authority;

(b) by the Treasury in relation to any other payments,

(but this subsection is subject to subsection (2)).

(2) Where the relevant Scottish authority is the Scottish Administration the power to make regulations under section 149(1) is exercisable by the Treasury (instead of the Scottish Ministers) in relation to payments made to –

(a) the holders of offices in the Scottish Administration which are not ministerial offices (read in accordance with section 126(8) of the Scotland Act 1998), and

(b) the members of the staff of the Scottish Administration (read in accordance with section 126(7)(b) of that Act).

(3) In this section “relevant Scottish authority” means an authority which wholly or mainly exercises functions which would be within devolved competence (within the meaning of section 54 of the Scotland Act 1998).

(4) Regulations under section 149(1) -

(a) if made by the Treasury, are subject to negative resolution procedure;

(b) if made by the Scottish Ministers, are subject to the negative procedure.

151 Power of Secretary of State to waive repayment requirement

(1) The Secretary of State may waive the whole or any part of any repayment required by **regulations made by the Treasury under** ~~virtue of~~ section 149(1).

(1A) The Scottish Ministers may waive the whole or any part of any repayment required by regulations made by the Scottish Ministers under section [New Clause] (1).

(2) A waiver may be given in respect of—

- (a) a particular exit payee, or
 - (b) a description of exit payees.
- (3) The exit payments regulations **made by the Treasury** may—
- (a) make provision for a waiver to be given only—
 - (i) with the consent of the Treasury, or
 - (ii) following compliance with any directions given by the Treasury, and
 - (b) make provision as to the publication of information about any waivers given.

() The exit payments regulations made by the Scottish Ministers may –

(a) make provision for a waiver to be given only –

- (i) with the consent of the Scottish Ministers, or**
- (ii) following compliance with any directions given by the Scottish Ministers, (in a case where the power to give a waiver under subsection (1A) is exercisable by a person other than the Scottish Ministers), and**

(b) make provision as to the publication of information about any waivers given.

(4) The exit payments regulations **made by the Treasury** may make provision for the power conferred on the Secretary of State by subsection (1) to be exercised instead—

~~(a) by the Scottish Ministers, in relation to qualifying exit payments made by responsible authorities who wholly or mainly exercise functions which would be within devolved competence (within the meaning of section 54 of the Scotland Act 1998);~~

(a) by the Department of Finance and Personnel in Northern Ireland, in relation to qualifying exit payments made by responsible authorities who wholly or mainly exercise functions which could be conferred by provision included in an Act of the Northern Ireland Assembly made without the consent of the Secretary of State (see sections 6 to 8 of the Northern Ireland Act 1998);

(b) by the Welsh Ministers, in relation to qualifying exit payments made by responsible authorities who wholly or mainly exercise functions which could be conferred by provision falling within the legislative competence of the National Assembly for Wales (as defined in section 108 of the Government of Wales Act 2006).

154 Supplementary provision about regulations

(1) Regulations under this Act, other than regulations made by the Scottish Ministers under section 1 **or [New Clause] (1)**, are to be made by statutory instrument.

(2) Regulations under this Act may—

- (a) make different provision for different purposes or cases;
- (b) make different provision for different areas;
- (c) make provision generally or for specific cases;
- (d) make provision subject to exceptions;
- (e) make incidental, supplementary, consequential, transitional or transitory provision or savings.

(3) Where regulations under this Act are subject to “negative resolution procedure” the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament.

(4) Where regulations under this Act are subject to “affirmative resolution procedure” the regulations may not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament.

(5) Any provision that may be made by regulations under this Act for which no Parliamentary procedure is prescribed may be made by regulations subject to negative or affirmative resolution procedure.

(6) Any provision that may be made by regulations under this Act subject to negative resolution procedure may be made by regulations subject to affirmative resolution procedure.