



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

9th Report, 2015 (Session 4)

Supplementary Legislative Consent Memorandum on the Small Business, Enterprise and Employment Bill

Published by the Scottish Parliament on 28 January 2015

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Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
 - (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; and
 - (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; and
 - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Nigel Don (Convener)
John Mason (Deputy Convener)
Margaret McCulloch
John Scott
Stewart Stevenson

Committee Clerking Team:

Clerk to the Committee

Euan Donald

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Delegated Powers and Law Reform Committee

9th Report, 2015 (Session 4)

Supplementary Legislative Consent Memorandum on the Small Business, Enterprise and Employment Bill

The Committee reports to the Parliament as follows—

1. At its meetings on 20 and 27 January 2015, the Delegated Powers and Law Reform Committee considered the provisions in the Small Business, Enterprise and Employment Bill (UK Parliament Legislation) (“the Bill”)¹ that confer powers to make subordinate legislation on the Scottish Ministers.
2. The Bill was introduced to the House of Commons in June 2014. It is a UK Government Bill, sponsored by the Secretary of State for Business, Innovation and Skills.
3. The Committee considered the Legislative Consent Memorandum that was lodged for the Bill (“the initial LCM”) on 19 August 2014. It reported that it was content with various delegated powers which are not the subject of this paper.²
4. The lead Committee is the Economy, Energy and Tourism Committee. The draft supplementary legislative consent motion (which will be lodged by the Deputy First Minister) 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.”

5. The Supplementary Legislative Consent Memorandum³ (“SLCM”) was considered by the Committee under Rule 9B3.6. The Committee is required to consider, and may report to the lead committee on, any provision in a Bill which is

¹ Small Business, Enterprise and Employment Bill available here:

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

² Delegated Powers and Law Reform Committee report on LCM on Small Business, Enterprise and Employment Bill available here:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/80512.aspx>

subject to a legislative consent memorandum which confers power on the Scottish Ministers to make subordinate legislation.

Delegated powers

6. The delegated powers which the Committee has considered are contained in sections 149 to 151 of the Bill, subject to amendments at the Lords Committee stage. The relevant amendments were tabled in the Lords on 7 January 2015, by Baroness Neville-Rolfe. (The SLCM usefully contains the relevant amendments in an appendix, plus the text of sections 149 to 151 and 154 incorporating the amendments.)

7. At its meeting of 20 January, the Committee agreed to ask for an explanation in relation to aspects of sections 149 to 151 and a proposed new clause of the Bill. The correspondence with the Scottish Government is reproduced at the Annex.

8. The Committee's conclusions on the provisions in sections 149 to 151 and the proposed new clause which confer power to make subordinate legislation on the Scottish Ministers are discussed below.

Sections 149 to 151 and proposed new clause – Regulations in connection with public sector exit payments

Relevant powers conferred on:	The Scottish Ministers
Exercised by:	Regulations
Procedure:	Negative (proposed clause, subsection (4))

Provisions

9. Clauses 149 to 151, and a proposed new clause, provide the Treasury and the Scottish Ministers with powers to make regulations requiring a public sector employee or office-holder in receipt of an "exit payment" (as a result of leaving work, or the relevant office) to return the payment or a proportion of it. This applies where they return to be an employee or contractor of a public sector authority as prescribed in the regulations, or a holder of a public sector office so prescribed.

10. The powers are exercisable by the Scottish Ministers in relation to payments made by a "relevant Scottish authority", and by the Treasury in relation to any other payments. A "relevant Scottish authority" is an authority which wholly or mainly exercises functions within devolved competence (within subject areas which have been devolved to the Scottish Ministers and the Parliament).

11. Where such an authority is the Scottish Administration, the powers are conferred on the Treasury, in relation to payments made to the holders of offices in the Administration (apart from Ministerial offices) and the members of staff of the Scottish Administration.

³ Small Business, Enterprise and Employment Bill Supplementary Legislative Consent Memorandum available here:

<http://www.scottish.parliament.uk/LegislativeConsentMemoranda/UKsmallbusinessLCM.pdf>

12. The proposed powers may be used to specify which employees, employers, office holders, and “exit payments” are within scope. They may specify exemptions from the requirements to repay “exit payments” (sections 150(1) to (3)).

13. The Regulations could prescribe the period within which the repayment obligation would arise - the period within which the person receiving the payment would become an employee or contractor of a public sector authority prescribed by the regulations, or a holder of a public sector office so prescribed (section 150(1)).

14. The Regulations may also make provision for the repayment arrangements, or tapering of repayments. They could prevent an “exit payee” from becoming an employee or a contractor of a prescribed authority, or a holder of a prescribed public sector office, until repayment arrangements have been made. They could also make provision as to the consequences of an exit payee failing to repay the amount to be repaid (section 150(3)(c) to (g)).

15. Clause 151 provides either the Secretary of State or the Scottish Ministers (as the case may be) with powers to waive the whole, or any part of, any repayment required by virtue of the regulations. The waiver can be in respect of a particular “exit payee” or a description of exit payee.

16. The regulations made by the Scottish Ministers could provide for a waiver to be given only with the consent of the Ministers, or after compliance with any directions given by the Ministers (where the power to waive has been given to another person). They could make provision as to the publication of information about any waivers given.

Comment

17. The Committee sought an explanation from the Scottish Government of why it has been considered appropriate that the regulations made by the Scottish Ministers under section 149 should be subject to scrutiny by the Parliament by the negative procedure rather than the affirmative procedure. The Government’s response is in the Annex.

18. The Committee notes that the response indicates that the negative procedure has been selected for scrutiny of the regulations as “questions of management of devolved public service workers, including questions of pay and conditions, have historically been a matter for Ministers rather than the Parliament, and the negative procedure is consistent with that. The negative procedure also enables the Scottish Government to legislate quickly to respond to new economic circumstances or changes in the makeup of the Scottish public sector.” The Committee remains unclear, notwithstanding that explanation, as to why the powers conferred on the Scottish Ministers, given their significance, are subject to the negative procedure. The Committee considers that the lead Committee considering the SLCM might consider this matter further.

19. The Committee accordingly draws the powers to make regulations which are conferred on the Scottish Ministers in sections 149 to 151 of the bill, and the response from the Scottish Government as to why scrutiny of

the regulations by the negative procedure has been selected, to the attention of the lead Committee for further consideration.

ANNEX

Correspondence with the Scottish Government

On 20 January 2015, the Committee wrote to the Scottish Government as follows:

At its meeting on Tuesday 20 January 2015, the Delegated Powers and Law Reform Committee considered a Legislative Consent Memorandum in relation to the Small Business, Enterprise and Employment Bill.

In considering the Bill, the Committee agreed to write to the Scottish Government to seek further explanation as regards clauses 149 to 151 and the proposed new clause (Power to make regulations to be exercisable by the Treasury or Scottish Ministers).

Specifically, the Scottish Government is asked to explain why it has been considered appropriate that the regulations made by the Scottish Ministers under clause 149 of the Bill should be subject to scrutiny by the Parliament by the negative procedure rather than the affirmative procedure. The Committee notes that these regulations would have significance. For example they would prescribe the public sector authorities and office holders in respect of which the “exit payments regulations” would apply, and what exemptions from requirements to repay “exit payments” would be available.

In addition, the Committee would welcome clarification as to whether Scottish Ministers would be exempt from this requirement to repay an exit payment and if that is the case why that exemption does not apply to MSPs.

On 21 January 2015, the Scottish Government wrote to the Committee as follows:

Points raised by the DPLR Committee in respect of Supplementary Legislative Consent Memorandum

Q: The Scottish Government is asked to explain why it has been considered appropriate that the regulations made by the Scottish Ministers under clause 149 of the Bill should be subject to scrutiny by the Parliament by the negative procedure rather than the affirmative procedure. The Committee notes that these regulations would have significance. For example they would prescribe the public sector authorities and office holders in respect of which the “exit payments regulations” would apply, and what exemptions from requirements to repay “exit payments” would be available.

A: Regulations made under the public sector exit payment provisions of the Bill will be able to make detailed provision about:

- (a) What types of payments made to public sector workers are qualifying exit payments
- (b) Which public sector bodies and offices are included within the payment recovery provisions
- (c) What proportion of the qualifying exit payment will be liable to be repaid, depending upon the value of the payment and the length of time the worker has been away from work in the public sector.
- (d) How workers who have received an exit payment and returned to work in the public sector are to declare this information
- (e) How these workers are to repay the monies that are owed; and
- (f) What the consequences are for workers who do not take steps to repay the monies that are owed.

Given the level of detail the above will require, and the likely need for such provisions to be updated regularly (e.g. to account for changes in the bodies which form part of the Scottish public sector, changes in the types of payments to be covered, changing economic circumstances, or the changing nature of the public sector workforce), the Scottish Government considers it appropriate to set out the details of the payment recovery provisions in Secondary legislation. To do so by way of regulations will ensure transparency and will allow for accountability for how the power has been used. The negative procedure will enable the Scottish Parliament to scrutinise the regulations to be made by the Scottish Ministers, and object to them if it considers that to be necessary. Questions of management of devolved public service workers, including questions of pay and conditions, have historically been a matter for Ministers rather than the Parliament, and the negative procedure is consistent with that. The negative procedure also enables the Scottish Government to legislate quickly to respond to new economic circumstances or changes in the makeup of the Scottish public sector.

Q: The Committee would welcome clarification as to whether Scottish Ministers would be exempt from this requirement to repay an exit payment and if that is the case why that exemption does not apply to MSPs.

A: The proposal is that Ministers would not be exempt from the exit payment recovery provisions. Ministers are however mindful that, under section 81 of the Scotland Act 1998, it is for the Scottish Parliament to make arrangements for MSPs' and Ministers' salaries, and that these arrangements are made under the Scottish Parliament Salary Scheme overseen by the SPCB. Ministers would therefore want to consider with the Parliament in due course whether (and, if so, how) exit payment recovery arrangements should be implemented for MSPs who do not hold Ministerial office and they would intend to do that well in advance of any regulations being made.

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS Group Scotland

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ISBN 978-1-78534-847-1
