Delegated Powers and Law Reform Committee

Legislative Consent Memorandum on the Enterprise Bill
Contents

Introduction 1
Delegated Powers Provisions 2
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; and

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary Bureau in accordance with Rule 9.18.3.
Committee Membership

**Convener**
Nigel Don
Scottish National Party

**Deputy Convener**
John Mason
Scottish National Party

**Richard Baker**
Scottish Labour

**John Scott**
Scottish Conservative and Unionist Party

**Stewart Stevenson**
Scottish National Party
Introduction

1. At its meeting on 5 January 2016, the Committee considered the provisions in the Enterprise 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 Lords. It had its 3rd reading in the Lords on 15 December 2015 and its 1st reading in the Commons on 16 December. It is a substantial UK Government Bill, sponsored by Baroness Neville-Rolfe, Parliamentary Under-Secretary of State for Intellectual Property. The Bill covers a range of matters much wider than those before the Committee for delegated powers consideration. An overview of the Bill as introduced in the House of Lords can be found at the start of the explanatory notes to the Bill².

3. The draft legislative consent motion, which will be lodged by the Deputy First Minister is:

   That the Parliament agrees that the relevant provisions of the UK Enterprise Bill, introduced in the House of Lords on 16 September 2015, relating to measures on the creation of a Small Business Commissioner and capping public sector exit payments, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of Scottish Ministers, should be considered by the UK Parliament.

4. The lead Committee in respect of this Legislative Consent Memorandum (“LCM”)³ is the Economy, Energy and Tourism Committee.

5. The LCM was considered by the Committee under Rule 9B.3.6. The Committee is required to consider, and may report to the lead committee on, any provision in a Bill which is subject to a legislative consent memorandum which confers power on the Scottish Ministers to make subordinate legislation. As with bills passed by the Scottish Parliament, the Committee’s role is to consider whether it is appropriate in principle for the power to be delegated to the Scottish Ministers, whether the terms of the power are appropriately drawn, and whether the level of scrutiny applied to the exercise of the power is appropriate.
Delegated Powers Provisions

6. This report refers to the clause and schedule numbers in the Bill as amended on Report in the House of Lords. Clause 34 and Schedule 4 confer powers on the Scottish Ministers to make subordinate legislation, as set out below.

7. There is no delegated powers memorandum ("DPM") available for the Committee’s consideration, but this is normal for UK Bills.

Clause 34 – Restriction on public sector exit payments

Powers conferred on: The Scottish Ministers
Exercised by: Regulations

Provisions

8. The powers in this clause extend across the UK. However, it helps to explain the provisions as a whole, rather than focusing solely on the powers conferred on the Scottish Ministers.

New section 153A of the 2015 Act

9. Clause 34 inserts new sections 153A to 153C into the Small Business, Enterprise and Employment Act 2015 ("the 2015 Act"). These sections provide further powers as to public sector exit payments. There are already certain powers in relation to such payments, contained in sections 154 to 157 of the 2015 Act. These are outlined below, in relation to the powers in Schedule 4 to the Bill.

10. The new section 153A confers powers by regulation to impose a restriction on exit payments payable to an employee of a prescribed public sector authority, or holder of a prescribed public sector office, as a consequence of them leaving employment or office. The section provides that the restriction will apply to an aggregate of all exit payments made to the individual within a period of 28 days, and that the initial value of the restriction will be £95,000.

11. The regulations under this section may also:

- prescribe what payments to an employee or post holder are within the scope of the restriction;

- provide that certain payments or category of payments are exempt from the restriction; and

- allow for a different amount to be substituted for the £95,000 figure above.
12. New section 153A describes types of payments which might be prescribed. These include payments for redundancy, voluntary exit, compensation for a reduction to pension on early retirement, other severance or ex gratia payments, other payments in respect of an outstanding entitlement, contractual compensation, payment in lieu of notice, or of shares or share options.

13. The section also confers power to amend an Act or relevant public sector pension or compensation scheme, to make sure they reflect the restriction on public sector exit payments.

New Section 153B

14. This proposed section provides for the power conferred on the Scottish Ministers. Regulations under section 153A are to be made by the Ministers in relation to payments made by a “relevant Scottish authority”, or by the Treasury in respect of all other payments (across the UK). The power to amend relevant public sector pension schemes will also be exercisable concurrently by any UK Minister, with consent of the Treasury.

15. A “relevant Scottish authority” is defined as any authority which wholly or mainly exercises functions within devolved competence. Broadly this means that an Act of the Parliament could confer, or has conferred, functions on the authority. The Scottish Parliamentary Corporate Body (“SPCB”) is also expressly included (subsection (5)).

16. Where the relevant authority is the Scottish Administration (or part of it) the regulations are made by the Treasury, in relation to payments to the holders of offices in the Administration which are not Ministerial offices, and payments to members of staff of the Administration.

17. This section also provides that the regulations will be subject to the affirmative procedure – whether made by the Scottish Ministers, the Treasury or a Minister of the Crown (subsection (4)).

New Section 153C

18. The Scottish Ministers (in respect of a relevant Scottish authority) may relax the whole or part of any restriction imposed by regulations under section 153A. (This may be for an individual employee or post-holder, or in respect of a class of them). This might be done on behalf of the Scottish Ministers by a person specified in the regulations. Where that is done, the regulations may provide for a requirement to be relaxed only with consent of the Scottish Ministers, or following compliance with any directions by Scottish Ministers.

Comment

19. The LCM outlines that the policy which underlies these powers may be controversial with some stakeholders (paragraphs 15 to 17). It is outlined that most respondents to consultation were in favour of the Scottish Ministers taking
relevant powers, but many respondents commented that “the UK Government's proposals were overly prescriptive, and that there were other routes for setting voluntary early severance/retirement payments at an appropriate level. Local government has indicated that they would wish to have continuing discretion over their own arrangements. Trade unions have been more forceful in asking the Scottish Government to reject the UK Government's proposals.”

20. While the policy which underlies these powers (exercisable across the UK) may be controversial, the Committee is considering the powers in principle, and the scrutiny procedure which is applied to the regulations.

21. The Committee has considered that in principle the scope of the powers is fundamentally defined by the proposed new section 153A(1). This subsection also sets out the policy proposal which underlies the powers. That is, there should be provision to secure that the total amount of exit payments which may be made to a person in respect of a public sector exit from a prescribed “relevant Scottish authority” (on leaving the employment or office) does not exceed £95,000.

22. There are wide powers to exempt from the restriction, but so far as these might be exercised, they will remove the restriction specified in the Bill, to that extent. The Scottish Ministers will also have the power, in relation to a “relevant Scottish authority”, to substitute a different amount for £95,000 (either up or down). However this change would also require the approval of the Scottish Parliament, through the affirmative procedure.

23. The Committee has considered that there is significance in the provision in the proposed new section 153B(5) – that a “relevant Scottish authority” expressly includes the SPCB. The regulations may therefore propose that the restrictions extend to the SPCB. The LCM does not appear to explain why this (as a matter of policy) has been considered appropriate.

24. The Committee finds that the powers to make regulations which are conferred on the Scottish Ministers in clause 34 are acceptable in principle. The Committee accepts that the exercise of the powers is subject to the affirmative procedure.

25. The Committee draws to the attention of the Economy, Energy and Tourism Committee that the LCM does not explain why the regulations that may be made by the Scottish Ministers, under the proposed new section 153A of the Small Business, Enterprise and Employment Act 2015, could extend to the Scottish Parliamentary Corporate Body as a “relevant Scottish authority” for the purposes of the regulations. This is by virtue of the provision in the new section 153B(5).
Paragraph 4 of Schedule 4: Restriction on public sector exit payments: consequential and related provisions

Powers conferred on: The Scottish Ministers
Exercised by: Regulations
Procedure: Negative

Provisions

26. Paragraphs 1 to 3 of Schedule 4 make minor amendments to the 2015 Act, as a consequence of inserting the new sections 153A to 153C which are explained above. This is to ensure that the existing sections 154 and 156 of the Act operate as intended.

27. Those sections 154 and 156 have conferred powers by regulation to require the repayment of a staff exit payment made to a public sector worker, where they return to work in the public sector within 12 months. The power can be used to specify which workers, which employers, and which staff exit payments are in scope, and how much of the payment is to be repaid.

28. Scottish Ministers may use those existing powers to make regulations in respect of staff exit payments made by Scottish public authorities. The Treasury may use the powers to make regulations in respect of all other staff exit payments made to public sector workers throughout UK. There are powers of the Secretary of State to waive the requirements of the Treasury regulations in specific circumstances, and of the Scottish Ministers, in respect of the Scottish regulations.

Delegated power

29. Paragraph 4 of the Schedule confers a further power to make regulations. This operates within the context of those existing provisions, but as a consequence of the proposals in clause 34 on the restriction of public sector exit payments.

30. The regulations may amend public sector pension or compensation schemes to ensure that, where the restriction on exit payments would have the effect of preventing the immediate payment of an unreduced pension, or preventing an employer paying an extra charge to the scheme, that benefits are instead immediately payable subject to an appropriate early payment deduction. An individual may also choose to buy out all or part of that deduction.

Comment

31. The Committee has considered that this proposed further power appears to relate to matters of relative detail. The powers would operate within the context of the existing powers in sections 154 and 156, and as a consequence of the proposals in clause 34.

32. The Committee also accepts that the negative procedure may be appropriate. Section 156 of the 2015 Act has provided that (where the existing powers under
33. The Committee finds that the powers to make regulations which are conferred on the Scottish Ministers in paragraph 4 of Schedule 4 are acceptable in principle. The Committee accepts that the exercise of the powers would be subject to the negative procedure.
1 Enterprise Bill [as amended] is available at the following website: https://www.publications.parliament.uk/pa/bills/lbill/2015-2016/0078/15078.pdf [accessed January 2016]
3 Enterprise Bill Legislative Consent Memorandum is available at the following website: http://www.scottish.parliament.uk/LegislativeConsentMemoranda/UKEnterpriseLCM.pdf [accessed January 2016]