

National Assembly for Wales

Constitutional and Legislative Affairs Committee

April 2014

Cynulliad
Cenedlaethol
Cymru
National
Assembly for
Wales



Report on the Legislative Consent Memorandum, Deregulation Bill

Background

1. On 24 February 2014, Alun Davies AM, Minister for Natural Resources and Food laid a Legislative Consent Memorandum (“LCM”) concerning the Deregulation Bill (“the Bill”).
2. On 4 March 2014, the Business Committee referred it to the Constitutional and Legislative Affairs Committee for scrutiny, setting a reporting deadline for the LCM of 1 May 2014.

Deregulation Bill

4. The Bill was introduced in the House of Commons on 23 January 2014 and received its Second Reading on 3 February. It is currently at report stage.
5. The Bill proposes a range of measures in line with the UK Government’s aim to reduce burdens on businesses and public authorities. Its scope includes health and safety, employment law, company and insolvency law, the use of land, housing, transport, communications, the environment, Child Trust Funds, entertainment, criminal justice and economic growth.
6. In July 2013, the UK Government published a draft Deregulation Bill, which was subject to pre-legislative scrutiny by a Joint Committee of both Houses of Parliament. A copy of a letter that we sent to the Joint Committee is attached at Annexe 1.

Provisions for which the Assembly's consent would be required

7. The provisions in the Bill (as introduced), for which consent is sought are listed below:

- Clause 3 - Apprenticeships: Simplification (Schedule 1, Part 3 *Apprenticeships: Wales*)
- Clause 24 - Reduction of burdens relating to the use of roads and railways (Schedule 8, Part 2 *Road humps*)
- Clause 30 - Other measures relating to animals, food and the environment (Schedule 11, Part 1 *Destructive imported animals*)
- Clause 30 - Other measures relating to animals, food and the environment (Schedule 11, Part 4 *Air quality*)
- Clause 30 - Other measures relating to animals, food and the environment (Schedule 11, Part 5 *Noise abatement zones*)
- Clause 35 - Abolition of office of Chief Executive of Skills Funding (Schedule 12, Part 1 *Main amendments*)
- Clause 36 - Further and higher education sectors: reduction of burdens (Schedule 13, Part 1 *Measures applying to England and Wales*)
- Clause 57 - Repeal of duties relating to consultation or involvement (Schedule 16, Part 2 *Measure affecting England and Wales*)
- Clause 60 - Legislation no longer of practical use (Schedule 17, Part 5 *Environment*)
- Clause 60 - Legislation no longer of practical use (Schedule 17, Part 6 *Animals and Food*)
- Clause 60 - Legislation no longer of practical use (Schedule 17, Part 8 *Criminal law*)

8. A detailed description of each of the provisions is provided in the LCM, together with the Welsh Government's view on them.

Consideration

9. We considered the LCM at our meeting on 31 March 2014 and attach at Annexe 2 to this report a paper that formed the basis for our discussion.

10. Overall, **we are content and have no objection to the LCM.**

11. We note and welcome the removal of clauses 51 and 57 from the Draft Deregulation Bill, which we expressed concerns about to the Joint Committee (see Annexe 1).

12. Nevertheless we remain concerned about the retention of clause 65 in the Bill as introduced (formerly clause 62 of the draft Bill). This clause permits the Secretary of State by order to make consequential amendments,

repeals and revocations as a consequence of the provisions in the Bill to any Measure or Act of the National Assembly; the order is subject to annulment in pursuance of a resolution of either House of Parliament only.

13. While an order made under this clause revoking provisions in an Assembly Measure or Act may be subject to Standing 30A (Consent in relation to statutory instruments made by UK Ministers), this is not, and should not be seen as, a substitute for a statutory obligation to seek the Assembly's consent to revoking laws it has made.

14. When we considered the LCM, we anticipated that further Legislative Consent Memoranda would need to be laid in relation to this Bill. A supplementary LCM has now been laid in relation to agricultural holdings and dogs. We will report on that and others that may be laid in due course.

Annexe 1 - Letter from Chair to the Chair, Joint Committee on the Draft Deregulation Bill

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol Constitutional and Legislative Affairs Committee

Lord Rooker
Chair
Joint Committee on the Draft
Deregulation Bill
House of Lords
London
SW1A 0PW

10 October 2013

Dear

Draft Deregulation Bill

1. I refer to the draft Deregulation Bill, published by the UK Government on 16 July, which is being scrutinised by your Committee.
2. I am very grateful to you for agreeing to accept evidence from the National Assembly after your original deadline of 16 September 2013.
3. We considered the Bill at our meeting on 7 October.
4. We note that many provisions of the Bill, as far as Wales is concerned, relate to non-devolved subjects such as company law, insolvency and international shipping. Other provisions affect legislation that applies only to England.
5. More significant are those that affect the law of England and Wales on subjects such as housing and local government. However, a preliminary examination of those detailed provisions suggests that care has been taken to limit the effect of those changes to England, for example, clauses 20 and 21 that relate to housing.
6. We have therefore concentrated our consideration on provisions that would be of general, rather than specific, application. In the context of these provisions, we have serious concerns about the nature of the powers being given to UK Ministers in relation to Wales as currently provided for in this Bill.

Clauses 51 and 57

7. From our perspective, the crucial provision of the Bill is clause 51. This would permit a Minister of the Crown to provide for legislation to cease to apply if the Minister considers that that legislation is no longer of practical value. The Minister would be able to do this simply by making an order. The legislation could be repealed or revoked generally or in relation to a specific part of the UK. The Bill contains examples of Westminster legislation that would cease to apply to England, but would continue to apply to Wales.

“Minister of the Crown” is defined in the Ministers of the Crown Act 1975 as “the holder of an office in Her Majesty’s Government in the United Kingdom, and includes the Treasury, the Board of Trade and the Defence Council.” Legislation for these purposes means an Act (of Parliament) or subordinate legislation, but *not* an Act or Measure of the National Assembly.

8. However, by virtue of clause 57(2), this Ministerial power to repeal legislation *would* also be exercisable in relation to any provision made by, or under, an Act of the National Assembly or a Measure of the National Assembly to the extent that the repeal was an “incidental, supplementary, consequential, transitional, transitory or saving” provision.

9. As the Bill is currently drafted, if a proposed order contained provision which would be within the legislative competence of the National Assembly were it contained in an Act of the Assembly, the UK Minister would have to obtain the consent of the Welsh Ministers, not the National Assembly. This is inconsistent with subsequent clauses which specify a super-affirmative procedure at Westminster for scrutiny of the order.

10. We strongly believe that there would be much greater democratic legitimacy if the UK Government were required to obtain the consent of the National Assembly, rather than the Welsh Ministers, before it repealed legislation made by, or within the competence of, the National Assembly.

11. Placing a specific statutory requirement to this effect in the Bill would reinforce the principle contained in Devolution Guidance Note 9, which states that:

“The UK Government would not normally bring forward or support proposals to legislate in relation to Wales on subjects in which the Assembly has legislative competence without the Assembly’s consent.”

Not making such a change to the Bill could undermine this principle.

12. The significance of such repeals should not be underestimated and they must be subject to thorough scrutiny in the National Assembly. As such, a proposal to repeal legislation of a nature described in paragraph 9 above should be laid before the National Assembly at the earliest opportunity to enable timely scrutiny by all relevant committees. We believe this to be a principle of such importance that a statutory duty to consult the

National Assembly (as well as to obtain its consent at a later stage in the process) should appear on the face of the Bill.

Clause 62

13. Clause 62(1) has a similar effect to clause 51. It would empower a Secretary of State by order to make such provision as he or she considers appropriate in consequence of the Act. That may include transitional, transitory or saving provision and amend, repeal, revoke or otherwise modify legislative provisions, *including* those made by the National Assembly. (For example, if an Act of the Assembly referred to legislation to be repealed by the Bill, that reference could be deleted.) Orders amending primary legislation would be subject to the affirmative procedure at Westminster; changes to subordinate legislation would be subject to the negative procedure.

14. In our view, orders made under clause 62(1) that amend, repeal, revoke or otherwise modify legislative provisions either made by the National Assembly or within its legislative competence must be subject to the National Assembly's consent.

15. Clauses 51, 57 and 62, and those related to them, are therefore of considerable concern to us and we believe should be changed or amended as we describe above to ensure that legislative scrutiny in the National Assembly is consistent with the process for legislative scrutiny at Westminster. We firmly believe that, if the Bill remains as currently drafted, it has the potential to undermine the existing devolution settlement in Wales.

Yours sincerely

David Melding AM
Chair

Annexe 2 – Legal Advice Note

This document has been prepared by National Assembly for Wales lawyers in order to provide Assembly Members and their staff with information and advice in relation to matters under consideration by the Assembly and its committees and for no other purpose. Every effort has been made to ensure that the information and advice contained in it are accurate, but no liability is accepted for any reliance placed on them by third parties.

Constitutional and Legislative Affairs Committee

DEREGULATION BILL

Legal Advice Note

Introduction

1. In July 2013, the UK Government published a draft Deregulation Bill. A Joint Committee of both Houses of Parliament conducted pre-legislative scrutiny of the draft Bill and the policies underpinning it. Evidence was submitted by the Constitutional and Legislative Affairs Committee that was highly critical of a proposal in clauses 51 and 57(2) of the draft Bill that UK Ministers should be able by order to repeal and revoke ‘legislation no longer of practical value’. That criticism was endorsed in very strong terms by other witnesses to the Joint Committee on the Draft Deregulation Bill. That Committee in turn issued a very critical report and that specific proposal has now been left out of the Bill as introduced.

2. The Bill was formally introduced in the House of Commons on the 23rd January 2014 and received its Second Reading on the 3rd February. Committee scrutiny in the House of Commons concluded on the 25th March. Report Stage will follow. It has been resolved that proceedings on the Bill will carry over to the next parliamentary session.

Background

3. The foreword to the draft Bill described it as “the latest step in the Government’s on-going drive to remove unnecessary bureaucracy that costs British businesses millions, slows down public services like schools and hospitals, and hinders millions of individuals in their daily lives.” It describes the contents of Bill as reducing unnecessary burdens on three main groups:

- “Freeing business from red tape;
- “Making life easier for individuals and civil society; and
- “Reducing bureaucratic requirements on public bodies.”

4. The Bill at introduction consisted of 69 clauses and 17 Schedules. Most deal with the removal of requirements that relate to specific subjects, which relate to varying degrees to the different parts of the United Kingdom. As far as Wales is concerned, many relate to non-devolved subjects such as company law, insolvency and international shipping. Others affect

legislation that applies only to England. More significant are those that affect the law of England and Wales on subjects such as housing and local government. However, in most cases those detailed provisions limit the effect of those changes to England, even if that is done by specifying that the existing law will in future only apply to Wales. Sometimes that is done by way of restatement.

The Legislative Consent Memorandum

5. A Legislative Consent Memorandum (LCM) was laid by the Welsh Government on the 24th February in relation to the Bill as introduced. The LCM identified a series of matters within the legislative competence of the National Assembly in relation to which its consent will be sought.

6. Clause 3 and Schedule 1 make very minor changes to the law relating to apprenticeships in Wales under Part 1 of the Apprenticeships, Skills, Children and Learning Act 2009.

7. Clause 24 and Schedule 8 amend the law in relation to road humps. Requirements to publish proposals will no longer be set out in the Highways Act 1980, but in regulations to be made by the 'appropriate national authority' (the Welsh Ministers in relation to Wales).

8. Clause 30 and Schedule 11 contain a number of provisions relating to animals, food and the environment. The objective of the change to the Destructive Imported Animals Act 1932 is to remove a requirement on occupiers of land to report sightings of grey squirrels because they have become so common. That requirement is contained in a 1937 Order, that could normally be revoked by relying on the same power that enabled it to be made. It is said that:

22. Unfortunately, it is not possible to simply revoke or amend the 1937 Order in the usual way (i.e. by subsequent statutory instrument) because the enabling power in the 1932 Act (which is also the power under which the 1937 Order would be amended) requires that, in order to exercise the Order making power, the Welsh Ministers (for our purposes) must be satisfied that it is desirable to prohibit or control the keeping of grey squirrels and destroy any at large. Given that grey squirrels are now common in the UK, neither the Welsh Ministers nor the UK Government can be so satisfied and consequently, the power in the 1932 Act is no longer available in relation to that species.

The logic of that argument is difficult to follow since it is easy to be satisfied that something is desirable, however difficult it may be to achieve that objective in practice. Nevertheless, the removal of a requirement to report sightings is clearly a reasonable objective for the Bill.

9. Subsequent Parts of Schedule 11 remove local authority functions in relation to air quality and noise abatement zones that are seen as superfluous.

10. Clause 35 and Schedule 12 relate to the abolition of the office of Chief Executive of Skills Funding in England and the transfer of functions to the Secretary of State. Amendments make minor consequential changes to a power to provide services in Wales only with the consent of the Welsh Ministers.

11. Clause 36 and Schedule 13 are intended to reduce burdens on local authority maintained further education institutions. As there are no such institutions in Wales, these changes will have no practical effect in Wales.

12. Clause 57 and Schedule 16 repeal duties relating to consultation or involvement. The majority relate to England only. Part 2 of Schedule 16 identifies two provisions that affect England and Wales. The first relates to the provision of sewers under the Water Industry Act 1991, and is not referred to in the LCM. It was the subject of a statement by the Minister for Natural Resources and Food on the 11th February 2014 that can be found here - <http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs.htm?act=dis&id=253655&ds=2/2014>

The second relates to the commencement of Business Improvement District arrangements, and is explained at length in the LCM. ‘

13. Clause 60 and Schedule 17 refer to legislation no longer of practical use. Although the order-making power included in the draft Bill is no longer included, the list of specific repeals remains. These are explained in detail in paragraphs 72-118 of the LCM-and whilst the inclusion of reference to competence in relation to ‘Economic development’ in some cases seems questionable, the provisions being repealed clearly do come within the Assembly’s competence. The Committee may be particularly interested in the obscure offences under the Town Police Clauses Act 1847 that are to be repealed. These include the flying of kites and beating of carpets!

Matters not referred to in the Legislative Consent Memorandum

14. Clause 52 of the Bill repeals section 4(10) of the Care Standards Act 2000, which was added to section 4 of the 2000 Act by section 4 of the Children and Young Persons Act 2008. That provision has not been commenced in relation to Wales, but remains part of the ‘Welsh Statute Book’. It is not referred to in the LCM and the Explanatory Memorandum to the Bill says that it is ‘relevant only to England.’ Nevertheless, the repeal of a provision that forms part of the law of Wales and is within the Assembly’s competence in relation to Social Welfare should be part of the subject matter of a Legislative Consent Memorandum. It would be helpful if the Government were to explain why this provision has not been included in the LCM.

15. Provisions of a more general nature referred to in paragraphs 16-17 and 21 are also not included in the LCM. It may well be the case that these are the subject of ongoing discussions between the Welsh and UK Governments, but if they remain part of the Bill in anything like their current form, the Committee may consider that they will need to be the subject of a further LCM.

Power to spell out dates described in legislation

16. Clause 58 contains a power for a Minister of the Crown by order to replace a reference in legislation to the commencement of a provision with a reference to the actual date. Provisions within the competence of the Scottish Parliament and Northern Irish Assembly are specifically excluded. There was no reference to Wales on introduction. There is no reference to this clause in the LCM although it will affect legislation within the Assembly's competence. Paragraph 269 of the Explanatory Memorandum to the Bill states that "Devolution discussions with all of the devolved administrations are ongoing."

17. On the 18th March, the Public Bill Committee agreed a government amendment that "an order under this section may not amend legislation made by the Welsh Ministers." As legislation for the purposes of this power is defined as 'an Act [of Parliament] or subordinate legislation' the power would not in any case have applied to Assembly Acts or Measures. The power will nevertheless apply to Acts of Parliament within the legislative competence of the Assembly.

Exercise of regulatory functions

18. Although not a matter that is itself within the Assembly's legislative competence, as is explained below, these provisions are for a purpose within that competence, namely 'economic development', which is one of the subjects in Schedule 7 to the Government of Wales Act 2006. It therefore comes within the test contained in Standing Order 29.1 in the same way that the Green Investment Bank provisions of the Enterprise and Regulatory Reform Bill were considered by the Assembly because they were for purposes related to the environment.

19. Clause 61(1) of the present Bill provides that "A person exercising a regulatory function to which this section applies must, in the exercise of the function, have regard to the desirability of promoting economic growth."

20. A Minister of the Crown would be able, by order, to specify the regulatory functions to which clause 61 would apply. Such an order could not specify a "regulatory function so far as exercisable in Wales, if or to the extent that the function relates to matters which are devolved Welsh matters." A devolved Welsh matter means a matter within the legislative competence of the National Assembly. Thus it would not apply, for example, to regulation by the Welsh Language Commissioner in relation to the Welsh

language, but would apply to the regulation of broadcasting in Wales by Ofcom.

General provisions

21. Clause 65(1) would empower a Secretary of State by order to make such provision as he or she considers appropriate in consequence of the Act. That may include transitional, transitory or saving provision and amend, repeal, revoke or otherwise modify legislative provisions, including those made by the National Assembly and devolved institutions in all parts of the United Kingdom. For example, if an Act of the Assembly referred to legislation to be repealed by the Bill, that reference could be deleted. In the usual way, amendments to primary legislation would be subject to the affirmative procedure at Westminster; changes to subordinate legislation would be subject to the negative procedure. The power to make such changes to Welsh legislation inevitably brings this power within the LCM process.

Postscript

22. The final session of the Committee Stage in the House of Commons took place on Tuesday the 25th March. Amendments agreed include Government amendments in relation to:

- Agricultural holdings;
- Taxis and Private Hire Vehicles;
- Building in England;
- Safety helmets: exemption for Sikhs;
- TV licences.

23. A further legislative consent memorandum will be required for any of these amendments that come within the test contained in Standing Order 29.1.

Legal Services

National Assembly for Wales

March 2014