Department for Business Innovation & Skills

Enterprise Bill: Government Response to the Delegated Powers and Regulatory Reform Committee's Ninth Report of Session 2015-16

Introduction

1. The Government is grateful to the Committee for its report on the Enterprise Bill, which forms a valuable part of the scrutiny of the Bill. The Government wishes to respond to the substantive points raised by the Committee before the Bill is considered at Report stage, in order to inform that debate.

Responses to recommendations

2. The Committee Report makes three recommendations which are below *(clause numbers used relate to the Bill print as amended in Grand Committee)*. One of these was a recommendation covering clause 26 (Power to restrict public sector exit payments) that regulations made under new section 153A(1) to (3) of the Small Business, Enterprise and Employment Act 2015 (inserted by clause 26 of the Bill) should always be subject to the affirmative procedure. The Government accepts that recommendation and has tabled amendments for Report Stage accordingly.

3. Of the remaining two recommendations, the Government has the following response.

Power to abolish the Small Business Commissioner (Clause 11)

4. The recommendation covering clause 11 (power to abolish the Small Business Commissioner) was that it is inappropriate for the Bill to confer on the Secretary of State a Henry VIII power to abolish the Small Business Commissioner without any of the procedural restrictions (beyond the need for an affirmative resolution in each House) of the nature set out in the Public Bodies Act 2011, particularly that requiring consultation.

5. We acknowledge the Committee's concerns detailed above, which seem to be

founded upon a central concern that the Henry VIII power should attract greater consultation.

6. In response, the Government has tabled amendments that set out that the abolition of the Small Business Commissioner should be dependent on (i) the completion of a 12-week consultation, (ii) the laying before Parliament of draft regulations and an explanatory document, and (iii) the provision of an ability for either House of Parliament to require an "enhanced affirmative" procedure for abolition. This is in addition to the requirement in clause 11(1) for the Secretary of State to satisfy himself following a review that there is no longer need for a Commissioner, or that the Commissioner's role has not been fully effective. The power in Clause 11 as originally drafted was not one which could be used lightly, but the Government accepts that the amendments will further enhance the permanence and authority of the office.

7. The Government has considered the provision in the Public Bodies Act 2011 referred to in the Committee's recommendation that the power to abolish the Commissioner should not be exercisable more than five years after the legislation comes into force. Similar provision has not been made in these amendments as the Government does not expect the Commissioner to achieve the necessary culture change in respect of late payment within five years and does not envisage early use of this power.

Power to "otherwise modify" primary legislation (clause 27)

8. The Government has carefully considered the concerns of the Committee about Clause 27 (power to "otherwise modify" primary legislation) and the Committee's view that the general principle should remain that modifications of primary legislation should be subject to the affirmative procedure. These were set out at paragraphs 17 to 21 of the report.

9. The Government accepts the general principle that changes made to primary legislation by secondary legislation should be subject to the affirmative procedure. The current approach to legislative drafting is such that, in the interests of clarity (and being helpful to the reader), changes to primary legislation are, wherever possible, made by textual amendment. In line with this, clause 27(4) provides that any textual amendment to primary legislation made under the clause 27 power will be subject to the affirmative procedure.

10. The Government notes the Committee's view that, if the current Government consider that particular kinds of modification of primary legislation should require only the negative procedure, while other types of modification should attract the affirmative procedure, they can and should spell those cases out in the Bill. The Government does not intend to accept this recommendation since it believes that doing so would create legal uncertainty. This is because there are outlying cases where it is not always clear when a provision non-textually modifies primary legislation. Such modifications can be quite indirect.

11. Given that there are cases where it will not be clear whether a provision of regulations non-textually modifies primary legislation, requiring such a modification to be subject to the affirmative procedure would mean that there

would be cases where it was not clear which procedure needed to be used. This would create a level of legal uncertainty that would be highly undesirable. In addition, the Government thinks that many of the cases that fall into this category are unlikely to warrant the use of the affirmative procedure in any event (because of their indirect/remote nature).

12. In the Government's view it is not possible to set out on the face of the Bill the particular kinds of such modifications which only require the negative procedure. The Government is not suggesting that all non-textual modifications should be subject to the negative procedure. But that:

    a. there will be provisions which can be seen as non-textual modifications for which that is true,

    b. they are impossible to describe in general words (at least without introducing the concept of a Minister exercising his or her judgment on the point), and

    c. drafting practice is such that, wherever possible, non-textual modifications are avoided in favour of textual amendment, which means that, as a general rule, a case where a non-textual modification which is of the same "weight" as a textual amendment is made will be rare.

13. The Government has undertaken to the Committee that, on those rare occasions, it will exercise its power to combine instruments to include the modification in an affirmative instrument. The Government recognises that this amounts to conferring discretion on Ministers to decide whether a particular non- textual modification of primary legislation warrants the negative or affirmative procedure, but given the limited occasions on which substantive provision would be made by such a modification and given that it can be unclear whether a provision non-textually modifies primary legislation in some remote way, the Government thinks that this position is justified.

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