

**DELEGATED POWERS AND REGULATORY REFORM COMMITTEE
SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL**

Supplementary Memorandum by the Department for Business, Innovation and Skills

Introduction

1. This Supplementary Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Business, Innovation and Skills with input from the Treasury.
2. It details an amendment to a delegated power in those Government amendments tabled in the House of Lords on 13 March 2015.

Part 11: Employment

Clause 156: Power to make regulations to be exercisable by the Treasury or Scottish Ministers: public sector exit payments

Power conferred on: the Treasury or Scottish Ministers

Power exercised by: Regulations

Parliamentary procedure: Affirmative procedure on first exercise, negative thereafter

3. The Treasury has carefully considered the Committee's 19th Report, and in particular that part of it which considers the public sector exit payment clauses of the Bill (clauses 154 to 157).
4. Before we reply substantively to the Committee's concerns, we would like to offer our apologies to the Committee for a part of our earlier response which, in hindsight, was not as clearly expressed as it should have been. We stated that "*The Committee's counterpart in the Scottish Parliament raised a similar question about the affirmative procedure, and appear to be content with the explanation provided by the Scottish Ministers...*"
5. We apologise that some text appears to be missing from this letter. The letter should have read "*The Committee's counterpart in the Scottish Parliament raised a similar question about the affirmative procedure, and the Scottish Parliament appear to be content with the explanation provided by the Scottish Ministers...*" (our emphasis)
6. Our intention was to convey that, when the Legislative Consent Motion was debated before the Scottish Parliament's Economy, Energy, and Tourism Committee on 4 February 2015, the issue of affirmative procedure was raised and debated, and the Economy, Energy, and Tourism Committee appeared to be content with the explanation proffered by Scottish Ministers given that their subsequent report did not make any comment about the need for affirmative procedure when they recommended that the Legislative Consent Motion be passed. We are not aware of any subsequent comment about affirmative procedure made during the vote on the Legislative Consent Motion on 24 February 2015, and infer from that that the Scottish Parliament was content with the explanation proffered by Scottish Ministers.
7. Of course, we had no intention of misrepresenting the position or concerns of the Delegated Powers and Legislative Reform Committee of the Scottish Parliament. If we have inadvertently done so, we profusely apologise. We fully take on board those concerns, and the concerns of the Committee, which we hope that our response today will address.

8. The Committee's 19th report states that the clause as now amended "*still leaves important matters relating to the requirement to repay exit payments wholly determined by the regulations, in particular the kinds of exit payments and the kinds of public sector authority employments to which the requirements might be applied*", and so recommended that the exit payment regulations should be made under the affirmative procedure.
9. The Treasury fully accepts that the exit payments regulations will be wide in scope, both in terms of the types of payments and the types of employments. The Treasury understands and agrees with the Committee's concerns that such a wide-ranging regime should not be imposed by Ministerial fiat, but should come under proper Parliamentary scrutiny.
10. However, in practice, there are practical problems which relate to the blanket use of the affirmative procedure. The Government's policy is to ensure that those highly paid workers who take an exit payment and then return to work in the same part of the public sector should repay a proportionate part of the payment designed to ease their progress into future work or retirement. But the ability to do so in practice depends upon the ability to capture moves within the public sector, which is a constantly changing sector.
11. The Government proposes to do this by ensuring that the Government sector is divided into sub-sectors, which will be defined by the contents of lists made in Schedules to the regulations. Those lists will also enable the capture of cross-border moves between Scottish and rest of the UK sub-sectors. Examples of such lists can be found in Schedules 1 to 5 of the draft regulations that we have published.
12. The constantly changing nature of the public sector requires that the lists contained in these Schedules will need regular updating so that the exit payments regulations are fit for purpose. For example:
 - (a) If a public sector body is transferred to the private sector, then a worker returning to that body should not be subject to repayment obligations. The relevant Schedule will need to be amended to remove the body to ensure that the worker is not inadvertently required to make a repayment.
 - (b) If a new public sector body is established, then the relevant Schedule will need to be amended to include that body, and if this is not done then workers returning to the new body who should be required to make a repayment are not.
13. Our concerns about using the affirmative procedure for such amendments are twofold.
14. First, we do not consider that such minor and technical amendments represent a proportionate use of Parliamentary time. We do not think that the affirmative procedure should be required each time the Schedules need to be updated, for example after a local authority establishes a company or body to run local services in part of its area, or similar minor and technical amendments need to be made.
15. Second, we consider that if the affirmative procedure were to be so used, this would naturally lead to a delay until the Schedules could be updated, in which time a worker who had taken an exit payment could return under the new arrangements without being required to make any repayment. That would frustrate the purpose of the regulations.
16. We did consider whether retrospective provision could be made, but we are of course cognisant of the human rights implications of retrospectively depriving any person of their lawful property, and are naturally reluctant to establish a legislative regime that would require this as a matter of course.
17. A delay would also have the effect of requiring a person to repay their exit payment when a body had been transferred to the private sector, in circumstances which the regulations are not intended to apply. We do not feel that would be fair to the individual in question.

18. Accordingly, and in order to balance the need for proper Parliamentary scrutiny with the practical need to ensure that the exit payment regulations can be amended so that they fulfil their purpose, we propose to lay an amendment at Third Reading to ensure that the first and main use of the power requires the affirmative procedure, but that subsequent (amending) regulations can be made by the negative procedure. This is done so in the understanding that the first set of regulations will contain the major substantive provisions, and subsequent regulations will contain minor and technical amendments. We understand that this is not unprecedented in statute.
19. The first use of the power will be to create the regulations which establish the exit payment recovery regime. They will contain full details of the sub-sectors, the types of payments, the circumstances in which recovery is mandated, the amount to be recovered, and the duties upon the persons involved to retain and communicate information and facilitate the repayments. These regulations will contain full details of the kinds of payments within scope, and the kinds of public sector authorities that are within scope. The draft regulations we have published set out the essential framework of what we propose to include in the first set of regulations (albeit that the detail of public sector bodies is shown by way of illustrative examples to save time by not replicating the entire public sector in the illustrative draft). We will also run a public consultation on the full set of draft regulations in advance of their Parliamentary scrutiny.
20. The second and subsequent regulations will contain the minor and technical amendments that we have described above, which are aimed solely at ensuring that the regime remains up to date and fit for purpose.
21. We hope that this is sufficient to answer the Committee's concerns.
22. The Committee in its 19th report also queried the necessity for the power in clause 154(2) to make "*other such provisions in connection with the repayment as the person making the regulations thinks fit*", given that clause 155(2) states that "*the exit payment regulations may, in particular, make provision [for a number of matters relating to exemptions for repayment, tapering of repayment, provision of information, and consequences of failure to repay]*".
23. These powers are to be used to establish the lists of bodies that form the sub-sectors, the tapering mechanism for repayment, and the duties upon the various persons involved to retain and provide information and facilitate repayment.
24. We note that the list of matters at clause 155(2) is not exhaustive. We also note that the matters covered by general power in clause 154(2) do overlap with the matters listed in the indicative list in clause 155(2).
25. However, we do not consider that there is a conflict between the two provisions. Clause 154(2) contains a general power to make ancillary provisions – subject to the "qualifying circumstances" requirements in clause 155(1) of return to the public sector within 12 months. Clause 155(2) simply sets out an illustrative list of how that power may be used. We note that the list in clause 155(2) does not mention the vitally important provisions for sub-sectors, which are essential to put the policy into place. Accordingly, clause 155(2) should not be seen as an exhaustive statement of the detailed provisions to be made by the exit payment regulations or a replacement for the general power in clause 154(2). It is simply an illustrative list of how that power should be used. We hope that this is sufficient information to reassure the Committee.