

LEGISLATIVE CONSENT MEMORANDUM

Small Business, Enterprise and Employment Bill

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Finance, Employment and Sustainable Growth, 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, relating to a range of measures on access to finance, data-sharing in education, and insolvency, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by John Swinney, Cabinet Secretary for Finance, Employment and Sustainable Growth, under Rule 9.B.3.1(a) of the Parliament’s Standing Orders. The Small Business, Enterprise and Employment Bill (“the Bill”) was introduced in the House of Commons on 25 June 2014. The latest version of the Bill can be found at:

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

Content of the Small Business, Enterprise and Employment Bill

3. The Bill results from the UK Government’s “Red Tape Challenge” and aims to promote economic growth by removing what are regarded as unnecessary impediments to business. The Bill will support small businesses by cutting bureaucracy and enabling them to access finance.

4. The Bill will require UK Ministers to set and report on a deregulation target for the period of each Westminster Parliament. The Bill will also aim to reduce delays in employment tribunals, improve the fairness of contracts for low paid workers and establish a public register of company beneficial ownership. The Bill will also impose higher penalties on employers who fail to pay their staff the minimum wage and will limit excessive redundancy payments across the public sector.

5. The Bill also includes measures relating to childcare, public sector procurement and to the introduction of legislation to provide for a new statutory code and an adjudicator to increase fairness for public house tenants. These measures will only be introduced in England and Wales and will not extend to Scotland.

6. The Scottish Government is determined to create a supportive business environment in Scotland and the measures in this Bill are in line with this ambition. We are fully committed to better regulation which helps small business by reducing unnecessary burdens and creating a favourable business environment in which companies can grow and flourish. The Scottish Government has already progressed a range of successful initiatives to change the stock, flow and culture of regulation in Scotland and deliver better regulation for all. In recognising that Scotland’s businesses are the primary drivers of sustainable economic growth, we are also keen to introduce

policies which will improve the performance of our businesses and make Scotland a more open and competitive place for companies to do business.

Provisions Which Relate to Scotland

7. The Bill makes provision in seven areas which extend to Scotland and are relevant under Chapter 9B of the Parliament's Standing Orders. These provisions are:

- Clause 1 – Access to Finance: Power to invalidate certain restrictive terms of business contracts
- Clause 67 – Education evaluation: Assessments of effectiveness
- Part 10: Clauses 106, 108, 110, 112 and 114 – Insolvency

8. Further detail on the effect of these provisions and the reasons for seeking the legislative consent of the Scottish Parliament are set out below.

9. Clauses 140 – 142 of the Bill make provision around the recovery of exit payments for public servants. This was a late addition to the Bill and the Scottish Government is still in discussion with the UK Government and Scottish stakeholders on the detail of the policy and the desirability of an LCM for this provision. If agreement is reached on the policy, the Scottish Government will lodge a supplementary LCM in due course. If there is no agreement, the Scottish Government will ask for the provision not to extend to Scotland and for the provision to be amended accordingly.

10. Clause 135 of the Bill makes provision around whistleblowing reporting requirements. The Scottish Government has recently been made aware that there are pending changes to the list of “prescribed persons” in the Public Interest Disclosure (Prescribed Persons) Order 1999 which will determine whether an LCM is required for this measure. The Scottish Government will continue discussions with the UK Government and ascertain whether an LCM is in fact required for this provision and will lodge a supplementary LCM in due course if required.

Reasons for seeking a legislative consent motion

Clause 1 – Power to invalidate certain restrictive terms of business contracts

11. The provisions contained in clause 1 of the Bill will directly change the law of contract in Scotland so that contracts for the supply of goods and services in Scotland can no longer contain terms which prevent the assignment of receivables (money owed for goods and services). The clause has a devolved purpose as it would make direct changes to Scots contract law generally. Legislative consent is therefore required for the Bill to extend to Scotland and would allow a parallel timetable for delivery, thereby ensuring that the legislation is consistent across Scotland, England and Wales.

Clause 67 – Education evaluation: Assessments of effectiveness

12. As the existing information sharing provisions in the Education and Skills Act 2008 only apply to persons 19 years and older, and as higher education is expressly excluded from the scope of these provisions, that provides only a partial picture on outcomes of learners. Further legislative provision is required to extend this data sharing to students under 19 and students in higher education so that a consistent approach can be taken across all sectors. Clause 67 of the Bill therefore amends section 87 of the 2008 Act to remove the restrictions on age, so that information can be shared about persons under the age of 19. Section 91 of the 2008 Act is amended by

omitting subsection (6), which excluded higher education from the scope of sections 87 to 90 of the 2008 Act. This means that information that relates to higher education is included in the information which may be disclosed under the 2008 Act.

13. The proposed amendments to this Part of the 2008 Act will allow the Scottish Ministers, the Department for Work and Pensions and HMRC to share education, benefit and tax data on all school leavers and students in further education and higher education. The sharing of this information will allow us to identify wage and employment outcomes for those who have undertaken training or further or higher education in Scotland.

14. Officials have agreed with their UK counterparts that this provision falls within devolved competence as it affects the assessment of education and training services and, therefore, that the consent of the Scottish Parliament will be required if it is to be extended to Scotland. Our view is that this should be extended to cover Scotland as sharing this information will allow us to identify wage and employment outcomes for those who have undertaken training or further or higher education in Scotland.

Part 10: Clauses 106, 108, 110, 112 and 114 – Insolvency

15. Under the insolvency reservation in Head C2 of Part II of Schedule 5 to the Scotland Act 1998, the general legal effect of liquidation is a reserved matter, but the process of liquidation and floating charges and receivership are for the most part devolved.

Clause 106 – Power for liquidator or administrator to assign causes of action

16. Clause 106 will amend the Insolvency Act 1986 (“IA 1986”) to allow administrators and liquidators to assign certain claims (rights of action) which they can pursue in the course of insolvency proceedings. So far as this relates to the position of a liquidator it is provision about the process of liquidation and therefore extension of the provision to Scotland, with a view to widening the options available to office-holders and providing the possibility of an increase in returns to creditors, triggers the need for legislative consent.

Clause 108 - Exercise of powers by liquidator: removal of need for sanction

17. Clause 108 makes provision which will allow the liquidator to exercise certain powers, the exercise of which currently requires prior agreement of either the company, a creditors’ committee or the court without the need for such agreement. This is provision about the process of liquidation, and therefore extension of the provision to Scotland, with a view to increasing efficiency and reducing costs associated with insolvency proceedings, triggers the need for legislative consent.

Clause 110 – Abolition of requirements to hold meetings: company insolvency

18. Clause 110 will (together with provision to be made in rules made under IA 1986 (“the rules”)) facilitate the taking of decisions by a company’s creditors or contributories in the course of insolvency proceedings by a ‘qualifying decision procedure’ – i.e. by means other than by convening a creditors’ meeting or contributories meeting as provided for in the rules (while preserving the possibility of a meeting if a particular proportion of creditors or contributories make a written request that the decision be made by a meeting). The provision will also pave the way for certain decisions to be taken by way of a ‘deemed consent procedure’ – i.e. a procedure whereby creditors or

contributories are given notice of an intended decision and are to be treated as having made that decision unless a particular proportion of them object.

Clause 112 – Ability for creditors to opt not to receive certain notices: company insolvency

19. Clause 112 makes provision which will facilitate creditors opting out of receiving certain notices which in terms of the rules they would otherwise require to be sent in cases where they have no on-going interest in the insolvency proceedings (such creditors being known as ‘opted-out creditors’).

Clause 114 – Sections 110-113: further amendments

20. Clause 114 confers power on the Scottish Ministers by regulations subject to the affirmative procedure to make certain amendments to the IA 1986 to remove requirements to hold meetings in insolvency proceedings – e.g. to remove requirements to hold meetings of creditors and contributories – and to provide for decisions to be taken by either a ‘qualifying decision procedure’ or ‘deemed consent procedure’ (on which see clause 110 of the Bill). Likewise it empowers Scottish Ministers to amend the IA 1986 to remove any requirement to send notices or other documents in the case of ‘opted-out creditors’ (on which see clause 112 of the Bill).

21. Clauses 110, 112 and 114 make provision about receivership and the process of liquidation. Their extension to Scotland, with a view to increasing efficiency and reducing costs associated with insolvency proceedings, triggers the need for legislative consent.

Consultation

22. There has been no formal consultation on the Bill as a whole by the Scottish Government. Both ICAS and ACCA Scotland have been informally consulted on the measure relating to the assignment of receivables and are broadly content with the proposal. The UK Insolvency Service carried out a formal public consultation exercise on their proposals in the Bill between 18 July and 10 October 2013. BIS held a Higher Education Statistics user engagement event on 30 January 2014 which highlighted the need to extend data sharing.

Financial Implications

23. There are no significant financial or resource implications anticipated as a consequence of agreeing this LCM. While there may be some resource implications for the analytical and ICT resource requirement for the education measures, this is expected to be met from existing budgets. In terms of the ban on receivables, some costs may be borne by law firms in making their staff aware of the changes to the law proposed but these are the usual costs associated with any reform of the law. These costs are likely to be small, however, and would be offset by the benefits for small business gain by extending the provision to Scotland. The insolvency measures are all intended to deliver efficiency savings in relation to different parts of the overall insolvency process and should, therefore, come at no net cost.

Conclusion

24. It is the view of the Scottish Government that it is in the best interests of the Scottish people and good governance that the relevant provisions outlined above and which fall within the legislative competence of the Scottish Parliament or alter the executive functions of Scottish Ministers should be considered by the UK Parliament.

SCOTTISH GOVERNMENT

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