

Paratowyd y ddogfen hon gan gyfreithwyr Cynulliad Cenedlaethol Cymru er mwyn rhoi gwybodaeth a chyngor i Aelodau'r Cynulliad a'u cynorthwyr ynghylch materion dan ystyriaeth gan y Cynulliad a'i bwyllgorau ac nid at unrhyw ddiben arall. Gwnaed pob ymdrech i sicrhau bod y wybodaeth a'r cyngor a gynhwysir ynddi yn gywir, ond ni dderbynnir cyfrifoldeb am unrhyw ddibyniaeth a roddir arnynt gan drydydd partion.

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## **Communities, Equality and Local Government Committee**

### **Legal Advice Note**

#### **THIRD LEGISLATIVE CONSENT MEMORANDUM – ENTERPRISE AND REGULATORY REFORM BILL –**

##### Background

1. On the 5th October 2012, the Minister for Finance and Leader of the House gave notice of a motion in the following terms –  
“To propose that the National Assembly for Wales, in accordance with Standing Order 29.6, agrees that those provisions of the Enterprise and Regulatory Reform Bill which relate to a power for Welsh Ministers to include sunset and review clauses in subordinate legislation, insofar as they fall within the legislative competence of the National Assembly for Wales, should be considered by the UK Parliament.”
2. The Legislative Consent Memorandum (“LCM”) was considered on the 9th October 2012 by the Business Committee, who agreed to refer the LCM to the Constitutional and Legislative Affairs Committee for scrutiny. The Business Committee agreed that the Committee should report on the LCM by 15 November 2012 to allow the Legislative Consent Motion to be debated in plenary on 20 November 2012. This Note is intended to inform that consideration.
3. This is the third LCM in relation to the Enterprise and Regulatory Reform Bill. A previous LCM was laid on the 12<sup>th</sup> June in relation to the water industry and another on the 10<sup>th</sup> July in relation to the Green Investment Bank. The matters dealt with in those LCMs are not included in the analysis that follows.

##### The Bill

4. The Enterprise and Regulatory Reform Bill was introduced in the House of Commons on the 20<sup>rd</sup> May 2012 by the Secretary of State for Business, Innovation and Skills. The Bill was given a Second Reading on the

11th June 2012 and then proceeded to Committee Stage. It completed its progress through the House of Commons on the 17<sup>th</sup> October, and will now proceed to the House of Lords. The Bill consists of six Parts, of which the current LCM is only concerned with clause 49 of the Bill as introduced into Parliament (clause 50 of the Bill as amended at Committee Stage in the House of Commons). This clause is contained in Part 5 of the Bill.

5. The different Parts of the Bill would change the law in different ways in different parts of the UK. In relation to the provision in question, the Explanatory Notes state that it extends to the whole of the United Kingdom. In relation to Wales, the Notes state that –

*“Westminster will not normally legislate with regard to devolved matters falling within the legislative competence of the National Assembly for Wales. Certain of the provisions of the Bill extending to Wales fall within the legislative competence of National Assembly for Wales. The consent of the National Assembly for Wales is therefore being sought for them through a legislative consent motion.”*

Unfortunately, the Notes do not explain which provisions in the Bill will be the subject of such motions. This lack of clarity is reflected in the fact that this is the third Legislative Consent Memorandum to be laid in the National Assembly in relation to provisions that were included in the Bill when it was introduced.

6. “The main purpose of the Bill [according to the Explanatory Notes] is to encourage long term growth and simplify regulation generally.”

7. The detailed explanation of this clause can be found in paragraphs 367 and 368 of the Explanatory Notes to the Bill:

*“367. This clause amends the Interpretation Act 1978 to help give effect to the Government’s policy on the use of sunset and review provisions which was first published in March 2011. A sunset provision provides for legislation to cease to have effect at a particular point in time. A review provision requires a person to review the effectiveness of the legislation within or at the end of a specified period.*

*368. Clause 49 inserts a new section 14A into the Interpretation Act 1978. This ensures Ministers and other people making subordinate legislation may include sunset and review provisions in that legislation and in other subordinate legislation where that is being amended. A review provision may include an obligation to consider whether the objectives of the legislation remain appropriate, and whether they could be achieved in another way. Review or sunset provisions may apply to all or part of the legislation or to its application in particular circumstances. Subordinate legislation including sunset or review provisions may also include certain supplementary provisions, for example transitional or consequential provisions or savings in*

*connection with the sunset or review provision. New section 14A does not apply to Scottish Ministers.”*

8. The effect of the clause is that any power to make orders or regulations will automatically include power to limit their effect to a specific period of time or to require the provisions to be reviewed. This is something that can already be included if the enabling power is broad enough. Thus regulations made during the foot and mouth emergency of 2001 under section 2(2) of The European Communities Act were often expressed to cease to have effect on a certain date. The clause that is the subject of the LCM would apply that power to all enabling legislation.

### Legislative Competence

9. The provisions to which the LCM refers do not come neatly within the National Assembly’s legislative competence. They are relevant to all powers to make delegated legislation granted to Welsh Ministers (as well as UK ministers), and could be included specifically in individual Assembly Bills that do come within that competence. The current approach means that would not be necessary. Its approach is similar to that in section 14 of the Interpretation Act (which Act the current clause would amend) that provides that any power to make subordinate legislation of the types described in the Act automatically includes a power to amend or revoke that subordinate legislation.

### The Consent Memorandum

10. The Legislative Consent Memorandum identifies clause 49 (on introduction) as the one that relates to the Assembly’s legislative competence and requires legislative consent. It is a clause that is not dependent on other provisions of the Bill.

11. Any statutory instruments made in reliance on this new power would still be subject to the affirmative or negative Assembly procedure if that applies to the substantive provision that is to be reviewed or to apply for a fixed period. Such a fixed period can be amended (shortened or extended) by amending orders or regulations as appropriate.

12. Recent examples of regulations that came before the Assembly that contained review provisions were the Waste (England and Wales) (Amendment) Regulations 2012 and the Conservation of Habitats and Species (Amendment) Regulations 2012. Both were considered by the Constitutional and Legislative Affairs Committee on the 24<sup>th</sup> September 2012. In relation to the former, the Committee reported under Standing Order 21.3(ii) as follows:

*“Regulation 2 (5) provides for the insertion of a new regulation 49 into the 2011 Regulations, which requires the Secretary of State to review the operation and effect of those Regulations in relation to England within 5 years after 1st October 2012 and within every 5 years after that. The Explanatory Memorandum is silent as to why in the event that it was not considered appropriate for the Welsh Ministers to carry out a review, this is the case.”*

The Government’s response was:

*“The current UK Government’s policy is to include a clause in all regulations that requires a review in a specified timescale. The Welsh Government does not have a similar policy in Wales. Welsh Ministers are able to review the regulations at any time. Consequently, the inclusion of the review provision in the instrument, was relevant only to England.”*

13. The Government’s response was understandable given that governments can review any legislation within their power at any time. The LCM explains clearly the merits of the approach proposed in the clause in question, but does not explain why the Government accepts those merits if its approach is to review legislation when it considers it appropriate rather than at a pre-determined time laid out in the legislation.

## Conclusion

14. The clause will simply apply to all enabling powers a power to provide for a cessation date or a review. That is something that can currently be included specifically in Assembly Bills. Any legislation made in reliance on the power will still be subject to Assembly scrutiny procedures in the usual way. It appears that the Welsh Government does not plan to make significant use of the power.

Legal Services

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