

PWYSIG: Mae'n bosibl bod y ddogfen hon ac unrhyw beth sydd wedi'i amgáu gyda hi yn cynnwys cyngor cyfreithiol sydd wedi'i roi yn gyfrinachol i Gomisiwn Cynulliad Cenedlaethol Cymru neu **unrhyw sefydliad arall sy'n rhan o Gynulliad Cenedlaethol Cymru. Os felly, mae'r cyngor yn destun braint broffesiynol gyfreithiol.** Peidiwch ag anfon y ddogfen hon (neu unrhyw atodiad iddi) at unrhyw berson y tu allan i Gomisiwn Cynulliad Cenedlaethol Cymru heb ganiatâd ysgrifenedig gan aelod o Adran Gwasanaethau Cyfreithiol y Comisiwn. Os ydych wedi cael y ddogfen hon drwy gamgymeriad, rhowch wybod i'r awdur ar unwaith drwy ei ffonio.

IMPORTANT: This document and any attachment may contain legal advice supplied in confidence to the National Assembly for Wales Commission or another organ of the National Assembly for Wales. If so, it will be subject to legal professional privilege. Do not forward this document (or any attachment) to any person outside the National Assembly for Wales Commission without the **written permission of a member of the Commission's Legal Services Department.** If you have received this document in error, please notify the author immediately by telephone

Constitutional and Legislative Affairs Committee

The draft 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 was appointed to conduct pre-legislative scrutiny into the draft Bill and the policies underpinning it. That Committee published a call for evidence with a closing date of the 16th September, and is due to report by the 16th December. One of the questions raised by the Committee was "What are the consequences of the draft Bill for the devolved administrations?" The Committee has therefore sought the views of the devolved legislatures, and has agreed to accept evidence from the National Assembly by the 11th October.

Background

2. The foreword to the draft Bill describes it as "the latest step in the Government's ongoing 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."

3. The draft Bill consists of 65 clauses and 16 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, a preliminary examination of those detailed provisions suggests that care has been taken to limit the effect of those changes to England; see for example clauses 20 and 21 that relate to housing.

4. This paper therefore concentrates therefore on provisions that would be of general, rather than specific, application. These are:

- “Legislation no longer of practical use (clauses 50-57);
- “Exercise of regulatory functions (clauses 58-61) ; and
- “General” provisions (clauses 62-65).

“Legislation no longer of practical use”

5. The concept of “legislation no longer of practical use” first appears in clause 50, which introduces Schedule 16. This, in turn, repeals or revokes specific legislation, and is explained fully in the Explanatory Notes. These give an indication of the sort of circumstances in which legislation might be considered to be of no practical effect. An example is the repeal of the Statutory Water Companies Act 1991 - following water privatisation and re-organisation, there are no longer any companies that would come within the provisions of the Act. Similarly the Agricultural Produce (Grading and Marking) Act 1928 and the Agricultural Produce (Grading and Marking) Amendment Act 1931 are to be repealed because they have been overtaken by European legislation.

6. 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.

7. 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 Scottish Parliament or the National Assembly, or a Measure of the National Assembly or by Northern Ireland legislation, - but only to the extent that the repeal was an incidental, supplementary, consequential, transitional, transitory or saving provision.

8. If a proposed order contained provision which would be within the legislative competence of the National Assembly if it were contained in an Act of the Assembly, the UK Minister would have to obtain the consent of the Welsh Ministers, but not the National Assembly. Subsequent clauses specify a super-affirmative procedure at Westminster.

9. Currently, the non-statutory Legislative Consent Motion procedure would apply to a UK Ministerial orders making provision within the legislative competence of the Assembly. However, it might be argued by the UK Government that a statutory requirement to obtain the consent of the Welsh Ministers would override such a non-statutory procedure.

The Committee is therefore invited to consider:

(a) whether it is content with the provisions as drafted;

and if not,

(b) whether UK Ministers should be able to disapply provisions which would be within the legislative competence of the National Assembly at all;

(c) whether they should be able to do so only with the consent of the National Assembly rather than the Welsh Ministers; or

(d) whether the Bill should instead provide for such orders to be made by the Welsh Ministers in relation to any provisions which would be within the legislative competence of the National Assembly; and in that case, what Assembly procedure should apply to such Welsh Minister orders (bearing in mind that a super-affirmative procedure is being applied at Westminster).

Exercise of regulatory functions

10. Clause 58(1) 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.”

11. A Minister of the Crown would be able, by order, to specify the regulatory functions to which clause 58 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.

Is the Committee content?

General provisions

12. Clause 62(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. 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.

Is the Committee content, or should a consent requirement be inserted in relation to legislation within the competence of the National Assembly?

Legal Services

National Assembly for Wales

October 2013