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Ein cyf/Our ref: LF/HL/101/10

Janet Ryder AM
Chair
Constitutional Affairs Committee
National Assembly for Wales
Cardiff Bay
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CF99 1NA

3 August 2010

Dear Janet,

Proposed Rights of Children and Young Persons (Wales) Measure

1. I am writing in response to your letter dated 8 July 2010, following my attendance at the meeting of the Constitutional Affairs Committee on 1 July 2010.

Orders under section 8 of the proposed Measure

2. Your letter refers to the Committee's concern that orders made by the Welsh Ministers under section 8 of the proposed Measure only have to be laid before the Assembly after being made, rather than being subject to affirmative or negative procedure. These are orders amending the proposed Measure to keep it in line with the United Kingdom's international obligations in respect of the United Nations Convention on the Rights of the Child and its Optional Protocols (UNCRC).

3. You have asked me whether I can identify any other examples of primary legislation being amended by a "no procedure" delegated power. The Human Rights Act 1998 (HRA) contains such provisions.

4. The HRA incorporates into the domestic law of the United Kingdom certain rights which are contained in the European Convention on Human Rights (ECHR) and Protocols to that Convention. The Act makes it unlawful in domestic law for a public authority to act in a way which is incompatible with those rights. Among other things, it allows those who allege that they are victims of such an unlawful act to take legal action against the public authority in question.

5. The HRA sets out in Schedule 1 the particular Articles of the ECHR and certain Protocols which the HRA incorporates into United Kingdom domestic law. Section 1(2) of the HRA provides that those Articles are to have effect subject to any derogation or reservation which the United Kingdom has made in respect of them, and which the Secretary of State has "designated" for the purposes of the HRA by making an order.

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6. Derogations and Reservations are set out in Schedule 3 to the HRA.

7. Section 14(1) of the HRA gives the Secretary of State a power to make an order designating a derogation for the purposes of the HRA, while section 15(1)(b) contains a power for the Secretary of State to make an order designating a reservation.

8. Section 14(5) places the Secretary of State under a duty *to amend Schedule 3 of the HRA as they consider appropriate* to reflect any order they have made under section 14(1) designating a derogation, or to reflect the fact that a designated derogation has been amended or replaced.

9. Section 15(5) places the Secretary of State under a duty *to make such amendments to the HRA as they consider appropriate* to reflect any order they have made under section 15(1)(b) designating a reservation, or to reflect the fact that a designated reservation has been withdrawn in whole or in part.

10. Section 16(7) places the Secretary of State under a duty *to make such amendments to the HRA as they consider appropriate* to reflect any withdrawal of a designated derogation by the United Kingdom.

11. Orders made under the provisions referred to in paragraphs 8 to 10 above are not subject to any Parliamentary procedure, and only have to be laid before Parliament (section 20(3) of the HRA).

12. You may find it helpful to consider the report of the House of Lords Select Committee on Delegated Powers and Deregulation, considering the above subordinate legislation making powers[1]. The report says:

28. Although the powers under clauses 14 (5), 15(5) and 16(7) are not subject to parliamentary control the Committee considers this appropriate as the powers are, in effect, consequential and limited to adapting the text of the bill to match changed international obligations. Parliament will, however, have control over derogations (see paragraph 29 below).

13. As this extract from the Select Committee's report notes, Parliament has control over whether ECHR rights drawn down into the Human Rights Act are made subject in the longer term to any derogations by the United Kingdom from those rights.

14. This is achieved through section 16(3) of the HRA which provides that an order made by the Secretary of State under section 14(1) designating a derogation will cease to have effect after a certain period (40 days less periods when Parliament is dissolved etc), unless approved by a resolution of both Houses.

15. Against this background, the Select Committee reported:

20. Accordingly subsection (5) of clause 14 requires the Secretary of State to make such amendments to Schedule 2[2] as he considers appropriate to reflect any order under subsection (1)(b) or the effect of subsection (3). Where a new derogation is designated, Parliamentary scrutiny will focus on the designation order itself as explained at paragraph 18 above. Given that close scrutiny, it is considered adequate that the

[1] House of Lords Select Committee on Delegated Powers and Deregulation, 1997-1998 Session, 6th Report, 6 November 1997, HL 32, 0 10 403298 7, http://www.publications.parliament.uk/pa/ld199798/ldselect/lddereg/032vi/dr0601.htm

[2] Schedule 2 in the Human Rights Bill became Schedule 3 in the Human Rights Act 1998.

essentially consequential provision which would be contained in an order under subsection (5) should simply be laid before Parliament (clause 20(2)).

16. The Select Committee reported in respect of the duty in section 16(7):

23. Where a designated derogation is withdrawn, consequential amendments will be needed to the Act to reflect that withdrawal. Clause 16(7) therefore requires the Secretary of State to make such amendments to the Act as are required to reflect the withdrawal of a designated derogation. An order under subsection (7) of clause 16 is required to be laid before Parliament (clause 20(2)). This is considered an appropriate degree of Parliamentary control for an order making such consequential changes.

17. The Select Committee reported in respect of the duty in section 15(5):

24. Article 64 of the Convention allows a state, when ratifying the Convention, to enter a reservation to a provision of the Convention modifying its legal obligations to the extent provided for in the reservation. The United Kingdom currently has a reservation in place in respect of Article 2 of the First Protocol and clause 15(1)(a) makes that reservation a "designated reservation" for the purposes of the Bill. Under clause 1, Article 2 of the First Protocol has effect under the Bill subject to any designated reservation. There is power for the Secretary of State to designate by order any other reservation which may be entered by the United Kingdom (clause 15(1)(b)).

25. An order under clause 15(1)(b) designating a reservation is to be laid before Parliament (clause 20(2)). Since any new reservation would go hand in hand with ratification of a protocol, Parliament would be asked to approve under the draft affirmative resolution procedure[3] the addition of any new Article in relation to which a reservation had been entered. If approval was forthcoming it would be given in the knowledge of the reservation itself and of the order designating it for the purposes of the Act.

26. As where a designated derogation is amended or replaced, the addition or removal of a designated reservation will necessitate amendments to Schedule 2. Accordingly subsection (5) requires the Secretary of State to make such amendments to Schedule 2 as he considers appropriate to reflect any order under subsection (1)(b) or the effect of subsection (3).

27. As with an order made under clause 14(5) or clause 16(7), a requirement to lay any such order before Parliament is considered adequate for an order making such consequential changes (clause 20(2)).

18. The Constitutional Affairs Committee will note from the above extracts that the Select Committee was satisfied with the existence of Parliamentary control over:

a) whether rights in any new protocol to the ECHR ratified, or to be ratified, by the United Kingdom (which could possibly be subject to a reservation by the United Kingdom) are incorporated into United Kingdom domestic law by being drawn down into the Human Rights, and

b) whether any of the rights drawn down into the HRA are made subject in the longer term to any derogation by the United Kingdom from those rights.

19. The Select Committee did not consider it necessary for Parliament to be able scrutinise orders by the Secretary of State making consequential amendments to the HRA to reflect whether and how rights in the ECHR or protocols to it had been incorporated into domestic law by being drawn down into the HRA.

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[3] See sections 1(4) and 20(4) of the Human Rights Act 1998.

20. Therefore, to respond to the question in the third paragraph of your letter, if it was considered that the Secretary of State had made amendments to the HRA which went beyond what was appropriate to reflect whether and how rights in the ECHR or protocols to it had been incorporated into domestic law by being drawn down into the HRA, the mechanism for challenging the Secretary of State's use of the power would be judicial review on the grounds that they had acted ultra vires.

21. On reading this, the issue which may occur to the Constitutional Affairs Committee is that, unlike Parliament in respect of the Human Rights Act, there is no stage at which the National Assembly for Wales scrutinises or exercises control over whether, for example, a new United Kingdom ratified protocol to the UNCRC is "incorporated into domestic law", or a right in a protocol is made subject to a derogation or reservation.

22. It may seem that this difference between the circumstances surrounding the HRA, and those surrounding this proposed Measure, lends weight to an argument that the National Assembly for Wales should be able to exert a degree of control over orders made by the Welsh Ministers under section 8 of the proposed Measure, amending it to reflect the fact that the United Kingdom has ratified a new protocol to the UNCRC etc.

23. However, the view of the Welsh Assembly Government is that it is precisely this difference between Parliament in relation to the ECHR and HRA, and the National Assembly for Wales in relation to the UNCRC and the proposed Measure, which would make it inappropriate for the National Assembly for Wales to be able to annul, or be asked to approve, an order by the Welsh Ministers updating the proposed Measure to keep it in line with the United Kingdom's UNCRC obligations.

24. Parliament passed the Human Rights Act 1998 to incorporate into domestic law in the United Kingdom certain international obligations contained in the ECHR and Protocols to it. Parliament continues to have ultimate control over whether rights in new protocols to the ECHR, or new derogations from rights, should be incorporated in United Kingdom law via the Human Rights Act. Parliament also has a role in decisions by the United Kingdom to ratify new protocols to the ECHR, as it would in respect of decisions to ratify new protocols to the UNCRC.

25. In contrast, the National Assembly for Wales has no control over decisions by the United Kingdom to ratify new protocols to the UNCRC or to make derogations, reservations or declarations in respect of UNCRC rights (nor has the Welsh Assembly Government of course)

26. The central purpose of the proposed Measure is to require Welsh Ministers in their strategic decision-making to have due regard to international obligations under the UNCRC, *as entered into by the United Kingdom.* Hence the need for the proposed Measure to be able to be kept up to date with those obligations.

27. If orders under section 8 of the proposed Measure were made subject to either negative or affirmative procedure, it would mean that the National Assembly for Wales would be able to resolve so as to prevent the proposed Measure being updated in line with the United Kingdom's international obligations.

28. Indeed, forgive me if I have misunderstood the fourth paragraph of your letter, but in that paragraph I think you may be contemplating a situation in which the Assembly might not be content with a new UNCRC right ratified by the United Kingdom, or a reservation from it made by the United Kingdom. You express the view : "That is a matter of policy in which the Assembly would have a legitimate interest. Why should it be deprived of an opportunity to debate the matter?"

29. However, if such debate culminated in, for example, the Assembly resolving under a negative procedure to annul an order made by the Welsh Ministers reflecting such a

new right or reservation, it would mean that the proposed Measure was no longer in line with international UNCRC obligations as entered into by the United Kingdom.

30. The National Assembly would have effected a “departure” from those international obligations for the purposes of the proposed Measure. This would mean that the Welsh Ministers would be required to have due regard to something which was not entirely the United Kingdom’s international UNCRC obligations.

31. Your letter suggests, as an alternative to keeping the Measure up to date via an order-making mechanism, including wording in the proposed Measure to have the effect of making the proposed Measure automatically reflect whatever the United Kingdom’s UNCRC obligations were at the relevant time.

32. I have not had the impression so far that the Committee disagrees that there is a value in setting out in the proposed Measure the substantive rights and obligations to which the Welsh Ministers must have due regard. I and my officials explained the Welsh Assembly Government’s reasons for doing this when we attended Committee on 1 July 2010.

33. In essence, the reasons are:

a) to try to make it easy for anyone to find those rights and obligations without having to refer back to and examine the UNCRC, its Protocols and United Kingdom reservations etc, and

b) to allow courts to interpret the rights and obligations set out in the Schedule in the UK and Wales context, should they consider it appropriate to do so.

34. Our view is that if the proposed Measure is not *textually* updated, and is instead updated automatically via “words of update”, the value of having the rights and obligations set out in the proposed Measure begins to be undermined.

35. Furthermore, we don’t think that automatic words of update could deal with, for example, inserting after section 1(1)(c) a reference to a new protocol which the United Kingdom had ratified.

36. Accordingly, we think that, given the approach we have taken of including the substantive rights and obligations in the text of the proposed Measure, and the purpose behind that approach, the order making functions in section 8 are necessary in order to ensure that the value of that approach is not eroded over time. However, I have noted the concerns that have been expressed about the lack of opportunity for the Assembly to scrutinise orders under section 8 before they are made. This is a matter which I am prepared to consider further.

<u>Orders under section 7 of the Proposed Measure</u>

37. We discussed at the meeting the provision made by the proposed Measure for orders under section 7 to be subject to affirmative procedure in the Assembly; you asked me whether consideration had been given to a super-affirmative procedure. Your letter refers me to an example in the Education (Wales) Measure 2009 of a super-affirmative procedure and seeks my observations.

38. The form of super-affirmative procedure in the Education (Wales) Measure requires the Welsh Ministers, if they are proposing to exercise the power in question, to consult such persons as appear to them to be representative of interests affected by their proposals. The Welsh Ministers are also required to lay a draft of their proposed order before the Assembly for a particular period, along with an explanation of their proposals and details of their consultation.

39. However, as my officials and I explained when we attended Committee, section 7 of the proposed Measure contains a number of provisions which are specifically designed to provide an opportunity for scrutiny of proposals by the Welsh Ministers to exercise their power under that section.

40. The Welsh Ministers are required to consult on whether, to what extent and with what amendments, the provisions of the Measure may be applied to 18 to 24 year olds using the section 7 power. The Welsh Ministers are required to set out in the children's scheme their proposals for consulting on this matter. As the children's scheme has to obtain approval from the Assembly, if the Assembly thinks that the consultation is not sufficiently broad it can refuse to approve the scheme. The Welsh Ministers will then have to revise their consultation proposals until they are in a form which is acceptable to the Assembly.

41. Following this consultation, the Welsh Ministers are required to lay before the Assembly a report on their conclusions about the issue of applying the Measure to 18 to 24 year olds. Public law duties mean that the Welsh Ministers will necessarily be required to take into account consultation responses in formulating their conclusions.

42. If the conclusion of the Welsh Ministers is that they are going to exercise the section 7 power, they are required to publish a draft of their proposed order and consult such persons and bodies as they consider appropriate on that draft. The view of the Welsh Assembly Government is that the consultation period should give the Assembly sufficient time to consider the published draft and make any representations to the Welsh Ministers that they consider appropriate.

43. Finally, as orders under section 7 are subject to affirmative procedure, if the Assembly was unhappy with a draft order as laid before it for approval, and considered that further scrutiny of the draft was needed, it could refuse to approve the order. This would mean that the Welsh Ministers could not make the order.

44. Accordingly, I remain of the view that section 7 already allows sufficient opportunity for scrutiny of orders to be made under that section.

I hope that the above assists the Committee.

Yours sincerely,

Huw Lewis AM/AC