

Legislation Committee

Date: 4 April 2006
Time: 9.30am
Venue: National Assembly for Wales, Cardiff Bay
Title: Scrutiny of Legislation in the Assembly

LEGISLATIVE AND REGULATORY REFORM BILL

(LEGAL BRIEFING NOTE)

Introduction

The Legislative and Regulatory Reform Bill 2005-06 extends the scope of the powers available to Ministers to amend statute law by Order and at the same time relaxes the constraints of parliamentary scrutiny on the Order making process.

This Legal Briefing Note concentrates on three particular aspects of the Bill - firstly references to Wales or to the National Assembly in the Bill; secondly, aspects where a specific reference might have been made to Wales or to the National Assembly; and thirdly, other aspects affecting the Assembly's own legislative processes.

References to Wales or its National Assembly

The principal reference to Wales is contained in clause 9 which requires a Minister of the Crown proposing to make an Order under clause 1 to obtain the agreement of the Assembly to any provision that confers, modifies or removes a function of the Assembly or restates such a provision. Clause 8, which deals with Scotland, prevents a Minister of the Crown making a provision that would be within the legislative competence of the Scottish Parliament, except insofar as it is consequential, supplementary, incidental or transitional.

Under clause 11(1)(c), a Minister must consult the Assembly where the proposals relate to a matter in relation to which the Assembly exercises functions, and where its consent is not required under clause 9.

Clause 22(3)(c) prevents a Minister specifying a regulatory function that is exercisable only in or as regards Wales for the purposes of clause 19, which sets out "the regulatory principles", and clause 20, which provides for the issuing and revision of a Code of Practice. Clause 22(4) instead provides that the Assembly may by Order specify such a function for those purposes.

Clause 30 provides that "Minister of the Crown" has the same meaning as in the Ministers of the Crown Act 1975. This does not include Assembly Ministers.

Provision that might be made in relation to Wales

The difference between clause 8 in relation to Scotland and clause 9 in relation to Wales is noteworthy. An order under this Act could not legislate for Scotland in relation to a devolved matter, save in the limited circumstances referred to above. The power in relation to Wales is much broader. Members may wish to explore the following issues with those presenting the paper produced by the Assembly Government –

Why is it proposed that a Minister should be able to make an Order amending, repealing or replacing legislation made by the Assembly?

Why is there no requirement for the Assembly to consent to such legislation?

Could this not be achieved by adding to clause 9?

Has consideration been given to leaving it to the Assembly to make any corresponding changes to its own legislation?

As mentioned above, a Minister of the Crown may issue a Code of Practice under clause 20, but it would be for the Assembly under clause 22(4) to “specify regulatory functions exercisable only in or as regards Wales” to which the Code should apply. Replies to the following points may be of interest –

Why is the Minister not required under clause 21(3) to consult the Assembly before issuing a Code that will apply in Wales?

Was consideration given to enabling the Assembly to issue its own Code in relation to regulatory functions exercisable only in or as regards Wales?

Is it considered that an order made by the Assembly under clause 22(4) would permit it, under clause 22(7), to make provision adapting the Code in its application to Wales?

Provisions affecting the Assembly’s legislative procedures

Part 3 of the Bill deals with legislation relating to the European Communities and contains a number of provisions of relevance to the Assembly.

Clause 25(1) amends the Interpretation Act 1978 to add to the terms defined in Schedule 1 the expressions “EEA agreement” and “EEA state”. That will enable those expressions to be used in Assembly legislation without the need to define them specifically in that legislation.

Clause 26 (1) amends Section 2 of the European Communities Act 1972 and Schedule 2 to that Act to enable implementing legislation to be made by Orders, Rules and Schemes in addition to Regulations. Clause 26(3) makes

a consequential amendment to Section 9 of the Government of Wales Act 1998 to apply that provision to legislation made by the Assembly. That will enable the Assembly to rely upon section 2(2) as an order making power where its powers under domestic legislation are inadequate for the purposes of implementing community obligations. It will still however be limited to the subjects in relation to which it has been designated for the purposes of section 2(2).

Clause 27 will enable subordinate legislation made for the purposes of implementing Community obligations to refer to community instruments "as amended from time to time". Accordingly, it will not be necessary to make repeated amending legislation to update cross-references to Community instruments as happens frequently in relation to animal health and food legislation. This will reduce the volume of routine legislation required to be made.

Further information

Members may be aware of the report¹ of the Regulatory Reform Committee of the House of Commons on the Bill from a Parliamentary perspective. Unfortunately, that Committee has no Welsh members, and the particular application of the Bill to legislating for Wales was not addressed.

Members may wish to note that when the Secretary of State for Wales appeared in front of the House of Lords Constitution Committee on 15 February 2006, the Chair drew parallels between the *Government of Wales Bill* and the *Legislative and Regulatory Reform Bill*, expressing a growing "edginess" in the Committee about moving things which used to be the sphere of parliamentary legislation to enactment through Orders in Council. The Conservative spokesman Oliver Heald MP also made the link in his speech on the Second Reading of the *Legislative and Regulatory Reform Bill*:

The Government are taking several overlapping measures, all of which remove power from the House and give it to Ministers. There is a process in the Government of Wales Bill to take power from the House and give it to Wales on a case-by-case basis.

The National Assembly's Local Government and Public Service Committee published a report in May 2005 following its review of the operation of the public services regulation and inspection regime in Wales. Members may wish to consider the report and its recommendations in the context of the proposals in the Bill. The report is available at:

<http://www.wales.gov.uk/assemblydata/N000000000000000000000000031315.pdf>

Finally, a recent article by David Pannick QC is attached as Annex A. The

¹ <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmdereg/878/87802.htm>

article considers the concerns surrounding the scope of the “astonishingly broad powers” that the Bill, if enacted, will confer on Ministers.

APS Legal
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Annex A

Another blow to Parliament?

David Pannick, QC. The Times, Feb 28, 2006.

IN *The Law and the Constitution*, Sir Ivor Jennings explained that parliamentary supremacy means that Parliament can make whatever laws it likes. So "if it enacts that smoking in the streets of Paris is an offence, then it is an offence" (perhaps no longer so absurd an example in the light of the Health Bill). Because of parliamentary supremacy, the legislature has power even to pass a law conferring the power to legislate on other people. The Legislative and Regulatory Reform Bill (LRRB) will, if enacted, do precisely that. It will confer astonishingly broad powers on ministers to make the law of the land.

Clause 2 allows a minister to "make provision amending, repealing or replacing any legislation" for one of two purposes: "reforming legislation" or implementing recommendations of the Law Commission.

Statutory provisions that authorise persons other than Parliament to make the law of the land are known as "Henry VIII clauses", however unfair that description may be (as Lord Justice Laws suggested in 2002 in the "Metric Martyrs case") to "his late Majesty, who reigned 100 years before the Civil War and longer yet before the establishment of parliamentary legislative supremacy".

Henry VIII clauses have become increasingly common in the past 50 years.

As well as the European Communities Act 1972 (which confers powers on Ministers to secure compliance with binding EU law), and the Human Rights Act 1998 (powers to bring legislation into line with the European Convention on Human Rights after a court has found a conflict), there are many other more mundane examples of ministers being authorised to amend the law. Since parliamentary time is finite, there can be no complaint (other than from constitutional purists) if Parliament confers a power on ministers to change the law to remove obsolete provisions, make uncontroversial changes or implement a policy approved by Parliament.

The objection to the LRRB is the breadth of the power it would confer on ministers. It allows a minister to make an order amending any area of the law, however controversial: abolishing jury trial, making it an offence to insult someone else's religion, permitting foxhunting every other weekend.

The Bill requires the minister, before making an order, to be satisfied that the policy objective could not be satisfactorily secured without passing a law, the effect of the measure is "proportionate", the provision "strikes a fair balance", it does not remove any "necessary protection" and it does not prevent persons from continuing to exercise any right or freedom that they "might reasonably expect to continue to exercise". But would a minister ever not be

so satisfied in relation to a policy proposal coming from his or her department?

Ministers would not be able to use the powers to increase taxation or to create criminal offences for which the punishment is more than two years' imprisonment, but those are limited protections. As Rob Marris, the MP for Wolverhampton South West, pointed out during the second reading debate earlier this month, ministers could use the powers to increase the penalty for using a mobile phone while driving to 18 months' jail. Before exercising the powers, ministers must consult widely, and any proposed order must be laid before Parliament for possible approval or disapproval. But a draft order would not receive the detailed consideration and debate that the normal parliamentary procedures guarantee before any Bill becomes an Act of Parliament.

The Government contends that the LRRB is designed to increase the efficiency of powers to remove unnecessary "burdens" previously conferred by the Deregulation and Contracting Out Act 1994 and the Regulatory Reform Act 2001. The Government has given an assurance that the new powers would not be used to introduce "highly controversial reforms". But nothing in the Bill confines its use to measures having a deregulatory effect. And ministerial assurances not written into a statute have no legal effect.

The traditional way for a Government to change the law is for a minister to pilot a Bill through all its stages in both Houses, answering questions, responding to proposed amendments and persuading others of the merits of the case. This is, no doubt, inconvenient for busy ministers, convinced that their proposals will add immeasurably to the welfare of the nation, and irritated by what they regard as the obstinacy of their opponents. Until now, ministers have recognised that the parliamentary process is a necessary element of a democracy, and that it may even improve the quality of legislation. It speaks volumes for the ever-increasing arrogance of this Government that it has introduced the Legislative and Regulatory Reform Bill and does not even understand the opposition to it.

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