Enterprise Innovation and Networks Committee

EIN(2) 01-06 (p.5)

Date: Wednesday 3 May 2006
Venue: Committee Room 2, Senedd, Cardiff Bay
Title: Legislative and Regulatory Reform Bill

Purpose

1. To answer the questions raised by the Committee at its meeting of the 16 March about the powers contained within the Legislative and Regulatory Reform Bill. Officials from the Cabinet Office and CAU will attend.

Summary

2. The Committee raised a number of issues. Chiefly:

- whether the LRR legislation could be used to abolish the Assembly;
- danger in the power to create criminal offences;
- the definition of "controversial";
- the role of Parliamentary committees in that definition;
- whether Orders will need to be agreed by Welsh Government Ministers or by the Assembly;
- whether LRRO provisions could be used to override legislation made in Wales; and
- the relationship between the LLR Bill and the Government of Wales Bill.

These issues are addressed below.

3. The Legislative and Regulatory Reform Bill (the Bill)

- **Whether an order made under the Bill could be used to abolish the National Assembly for Wales (NAW)**

The short answer is no. Legislation must be seen in context - powers are derived for a purpose. In the case of the LRR Bill, its provisions are to deal with regulation and desirable technical reforms of the law. The use of those powers to abolish the NAW would be outside its scope.

Part 1 of the Bill replaces the order-making power in the Regulatory Reform Act 2001. The Bill is a key part of the UK Government's better regulation agenda, and will provide the legislative vehicle required to tackle overly burdensome regulation, establish a base line standard for regulatory activity and ultimately maintain the UK's position as one of the world's best business environments.

However, the UK Government recognises the need to ensure that there are safeguards in place to protect against the abuse of this power. To this end, the Bill contains a number of safeguards to ensure the order making power is used appropriately, including specific provision that orders cannot affect the functions of the National Assembly without the agreement of the Assembly. Additionally, measures deliverable under Part 1 of the Bill must meet a set of preconditions and restrictions which protect, for example, against the removal of rights and freedoms, and will be subject to thorough consultation and Parliamentary scrutiny. These safeguards support the UK Government's undertaking not to deliver highly controversial measures by order.

The consultation process and the Parliamentary scrutiny process should identify any proposals that fall into this category. Furthermore, the UK Government has undertaken not to force any order through in the face of opposition from a committee of either House and is currently reflecting on how best to write this ability to veto Orders onto the face of the Bill.

The agreement of the Assembly must be obtained where an order either confers a function on the Assembly, or modifies or removes a function of the Assembly or merely restates a provision of legislation which itself conferred a function on the Assembly. **It is because of these preconditions and undertakings that an Order made under the Bill could not be used to abolish the Assembly.**

- **Danger in the power to create criminal offences**

Clause 6 places a limitation on the order-making power. It sets the maximum criminal penalties both for any new offence that an order creates or for any existing offence where an order increases the penalty.

The Bill maintains the limits in the 2001 Act. However the limits in the 2001 Act applied when the order-making power was used to create a new criminal offence. The limits in clause 6 apply not only when the order making power is used to create a new offence, but also when the penalty for an existing offence is being increased.

The restriction on not being able to create new offences with penalties above certain levels, or increase a penalty for an existing offence above those same levels, does not apply to orders implementing Law Commission recommendations. These recommendations are based on expert consideration and extensive consultation. However at Committee stage Jim Murphy agreed to reflect on whether it might be more appropriate for orders implementing Law Commission recommendations also to be subject to these limits.

- **The definition of "controversial";**

- **The role of Parliamentary committees in that definition;**

The UK Government has undertaken not to use the order-making powers in the Bill to effect highly controversial measures. The consultation process and the Parliamentary scrutiny process whould identify any proposals that fall into this category. Furthermore, the UK Government has undertaken not to force any order through in the face of opposition from a committee of either House and is currently reflecting on how best to write this undertaking onto the face of the Bill.

- **Whether Orders will need to be agreed by Welsh Assembly Government Ministers or by the Assembly**

The agreement of the Assembly must be obtained where an order either confers a function on the Assembly, or modifies or removes a function of the Assembly or merely restates a provision of legislation which itself conferred a function on the Assembly.

The current wording in the Bill applies to the National Assembly for Wales as constituted by the Government of Wales Act 1998, meaning that the consent of the Assembly as a whole is required in these circumstances. The wording carries forward provisions in the 2001 Regulatory Reform Act.

However the Government of Wales Bill provides that when the separation of the Welsh Ministers as an executive from the Assembly as a legislature takes place following the May 2007 elections, the functions exercised by the Assembly will become functions of the Welsh Ministers unless different provision is made by Order in Council. Thus as things stand, after May 2007 it will be the Welsh Ministers who will have to give their consent to orders which affect their functions and who will have to be consulted under Clause 11 of the LRR Bill on proposals relating to their functions, where their consent is not already required under Clause 9 of the Bill

Whether LRR Bill provisions could be used to override legislation made in Wales / The relationship between the LRR Bill and the Government of Wales Bill

As regards subordinate legislation which will be made prior to May 2007 by the Assembly and after May 2007 by the Welsh Ministers, that subordinate legislation could not be modified without the consent of either the Assembly or – when they have assumed those functions - the Welsh Ministers. Most legislative and regulatory reform orders will be modifying provisions in Acts of Parliament.

However the LRR Bill is silent as to what consent is required where a legislative or regulatory reform order proposes to modify an Assembly Measure or an Act of the Assembly (which is possible given the definition of “legislation” in clause 1 (3) of the LRR Bill) or when a legislative or regulatory reform order seeks to make provision that is within the legislative competence of the Assembly. The Welsh

Assembly Government position is that the consent of the Assembly should be required in such cases. This is being pursued in conjunction with the Cabinet Office: it is quite normal for amendments to Bills to have to be made to take account of other legislation being considered in the same session.

In addition the Government of Wales Bill will create the opportunity for the Assembly to acquire competence to legislate by Assembly Measure on particular matters (or, following a referendum, by Act of the Assembly on all devolved subjects). It will therefore be open to the Welsh Ministers and the Assembly to seek to take the initiative, if they wish, in implementing legislative or regulatory reform on devolved matters.

Compliance

9. There are no issues of regularity or propriety.

Financial Implications

10. There are no financial implications.

Action for the Committee

11. The Committee is invited to note the above.

Constitutional Affairs Unit - Welsh Assembly Government
Cabinet office

CabinetOffice

Jim Murphy MP
Parliamentary Secretary

70 Whitehall
London
SW1A 2AS

Telephone 020 7276 0409
Fax 020 7276 0655
E-mail psco@cabinet-office.x.gsi.gov.uk
Web www.cabinet-office.gov.uk

Andrew Miller MP

Chair of the Regulatory Reform Committee

House of Commons

12 April 2006

Dear Andrew

As you know, the Legislative and Regulatory Reform Bill has potential to make a real impact on reducing burdensome regulation. This Bill is the third attempt by a government since 1994 to have an Act that can improve the way we regulate for the public sector, businesses, charities and the voluntary sector. We must get this third attempt right if we are not to put our shared ambitions on the better regulation agenda at risk.

As I've mentioned before, the Regulatory Reform Committee and its equivalent in the Lords have played an important role in constructively scrutinising the proposals in the Bill. And I would like to thank you for the important contribution you made during the Bill's committee stage.

The Bill's passage so far has served to confirm the general consensus that the 2001 Act is not up to the job of delivering the action on red tape that businesses, public servants and voluntary workers tell me they need. That's because the 2001 Act is too narrowly defined and too complicated to use. The new Legislative and Regulatory Reform Bill aims to deal with these shortcomings.

However in its current form, the Bill has caused some people to voice concern about the order making power of the Bill. Some of the wilder concerns have ranged from government being able to use the power to abolish trial by jury to repealing the Magna Carta. These and other far-

fetched concerns about our constitutional arrangements could never happen as a result of this Bill. Similar wild accusations were made in 1994 and 2001 and proved to be groundless.

However, I have listened to more measured concerns about using the power for changes to legislation that deliver no better regulation benefit. Again I must stress that this Bill is to deliver our better regulation agenda and nothing else.

I am writing to you today to confirm my intention to move this debate on to the real agenda of better regulation and to remove any cause for concern that the Legislative and Regulatory Reform Bill could ever be used for anything other than achieving our better regulation objectives.

Let me be quite clear, safeguards already in the Bill ensure that the order-making power cannot be used to remove necessary protections, rights or freedoms. And I have already made a commitment to give Parliament a statutory veto on the face of the Bill. In addition, I am now looking into making the power more clearly focused on delivering better regulation objectives. But I am determined that the power is framed in such a way that we still are able to deliver real change, including the initiatives that departments will be proposing in their forthcoming simplification plans and the benefits of our ambitious admin burdens reduction programme. There is real determination in Government to deliver on these commitments.

The types of initiative we would want to use the Bill for include the simplification and consolidation of legislation so it is easier for business, the public and voluntary sectors to work with; ensuring that inspection is risk-based to reduce regulatory burdens; the streamlining of consent regimes to make them more transparent; the reduction of administrative burdens and the exemption in certain key instances of SMEs, charities and others from burdensome regulation.

I hope to bring forward appropriate amendments by Commons Report Stage to achieve these aims.

All those who want to see real action taken to lighten the regulatory load on business, our public services and the voluntary sector will be reassured by focussing the order making power on better regulation objectives. There will now be a clear expectation from businesses, the public sector and voluntary workers that this Bill receives broad support.

Jim Murphy