Education, Lifelong Learning and Skills Committee

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LEGISLATIVE AND REGULATORY REFORM BILL (LEGAL BRIEFING NOTE)

At its meeting on 16 March 2006, The Economic Development and Transport Committee considered the above Bill and requested further information. The Minister agreed to provide a paper on the interaction between the current Government of Wales Bill and the Legislative and Regulatory Reform Bill. Examples were also requested of the way in which the provisions of the Bill might operate under the Government of Wales Act 1998, and these are set out below.

The Legislation Committee, in its current review of the technical scrutiny of legislation by the Assembly, has received evidence on this subject. Mr. David Lambert of Cardiff Law School, and formerly head of the Welsh Office Legal Department and Legal Adviser to the Presiding Officer stressed the importance of the Assembly scrutinising draft orders to be made under this Bill when enacted. His concerns are set out in his note at Annex 1. For ease of reference, my earlier paper is attached as Annex 2.

Gwyn Griffiths
APS Legal
29.03.06

EXAMPLES OF CHANGES PROPOSED TO BE MADE BY ORDER UNDER THE LEGISLATIVE AND REGULATORY REORM BILL

1. Proposal to amend the Government of Wales Act not amending a function of the National Assembly – such as electoral arrangements. The requirement for Assembly agreement under clause 9 of the Bill would not apply. The Assembly would need to be consulted under clause 11(1)(c), as this would relate to a matter in relation to which the Assembly exercises functions.

2. Proposal to amend this or any other Act to confer, modify or remove Assembly functions – such as the power to make subordinate legislation. The requirement for Assembly agreement under clause 9 of the Bill would apply. That agreement would have to be given by a simple majority of the Assembly in plenary under Standing Order 26.

3. Proposal to amend or revoke subordinate legislation (including Assembly Measures) conferring a function on the Assembly – such as serving notices on individual farmers under animal health legislation. The requirement for Assembly agreement under clause 9 of the Bill would apply. That agreement would have to be given by a simple majority of the Assembly in plenary under Standing

Order 26.

4. Proposal to amend or revoke Assembly subordinate legislation (including Assembly Measures) not conferring a function on the Assembly – such as requirements on farmers to cleanse and disinfect vehicles under animal health legislation. The requirement for Assembly agreement under clause 9 of the Bill would not apply. The Assembly would need to be consulted under clause 11(1)(c) as this would relate to a matter in relation to which the Assembly exercises functions.

5. Proposal to amend legislation in relation to a non-devolved matter – such as criminal court procedures. The requirement for Assembly agreement under clause 9 of the Bill would not apply. The Assembly would not need to be consulted under clause 11(1)(c) as this would relate to a matter in relation to which the Assembly does not exercise functions. It could still be consulted under clause 11 (1)(e) which requires the Minister who proposes to make the order to "consult such other persons as he (sic) considers appropriate.

Annex 1

The Legislative and Regulatory Reform Bill

1. Outline of its Provisions

The report of the Regulatory Reform Committee of the House of Commons on the Bill published on January 31st states at paragraph 38 that:

"...the main provisions of Part 1 empower any Minister by order to make provision amending, repealing or replacing any legislation, primary or secondary, for any purpose....In summary, therefore, that Part, in providing mechanisms for streamlining legislative procedures strengthened the powers of Ministers - whichever party is in office - in relation to other Members of Parliament. It does so by giving Ministers a concurrent general power to legislate without the constraints that primary legislation normally imposes, in particular, the need to fit Bills in the Parliamentary timetable".

2. References to the Assembly in the Bill

Under clause 9 of the Bill the Assembly has to agree to the making of a

Ministerial Order -

(a) conferring a function on the Assembly,

(b) modifying or removing a function of the Assembly

(c) restating any provision which already confers a function on the

Assembly.

3. The effect of the Bill's provision on the Assembly post-2007

(a) The Bill has the potential of being at least as equally important to the giving of new powers to the Assembly as the existing and continuing system of giving new powers in Acts of Parliament and the proposed system post-May 2007 of giving powers under Orders in Council under the Government of Wales Bill.

This is because, as the Select Committee emphasises, Ministers will have the same power to make law as Parliament possesses. These powers are subordinate legislative powers but they are as extensive as provisions which can be put into Acts of Parliament.

(b) It is therefore very important to establish the role that the Assembly, as opposed to the Assembly Government, will play in discussions with Central Government leading up to the making of orders under the Legislative Bill.

Clause 9 refers to the necessity for the Assembly to agree to orders giving or affecting Assembly powers. Under the provisions of the Government of Wales Bill this reference to the "Assembly" could well become a reference to the Assembly Government.

While the Assembly Government has an important role to play, I consider that the Assembly separately must also ensure that it establishes procedures whereby it can monitor and take part in discussions in relation to proposed orders under the Legislative Bill in the same way as it must establish procedures to monitor and discuss draft Orders in Council under the Government of Wales Bill.

4. Conclusion

I consider that the Legislative and Regulatory Reform Bill is of the utmost importance in developing the future powers of the Assembly. It has the potential of giving powers which are as wide, if not wider than can be obtained by Order in Council under the Government of Wales Bill or under new Acts of Parliament. This is because of the Ministerial flexibility, which is available in the making of Legislative Bill Orders. The Assembly must therefore consider as quickly as possible the machinery for considering proposals for orders under the Legislative Bill. It is possible that the Bill will be enacted at about the same time as the Government of Wales Bill and may become fully operational before May 2007.

David Lambert

Annex 2

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

APS Legal March 2006

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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