

Growth and Infrastructure Bill

House of Lords Second Reading, Tuesday 8 January 2013

The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 160,000 members, promoting the highest professional standards and the rule of law

Key points

This briefing has been prepared by the Society's specialist committees: part one by the Planning and Environmental Law Committee, and part two by the Employment Law, Company Law and Tax Law Committees. In relation to both parts of the Bill the Society's concern is to ensure good law making and legal clarity and avoid possible unintended consequences.

- **Changes to planning law:** The Society welcomes most provisions, but notes some areas where greater clarity may be required in order to avoid possible unintended consequences.
- **Employee shareholders:** The Society is concerned that the complexity and costs of this scheme will create complex issues for employers, with potential for satellite litigation, which will deter employers from recruiting on this basis.

Part 1: Changes to planning law

1. The Society's Planning and Environmental Law Committee have undertaken detailed scrutiny of the Bill's proposed changes to planning law, details of which were contained within the Society's submission to the Public Bill Committee¹.
2. **Clause 1: Option to make planning application directly to the Secretary of State** – The Society welcomes this provision, which will assist in circumventing delays. However, There is a question over whether the Planning Inspectorate will be equipped to undertake negotiations between the parties on the major developments, for example over planning obligations, which are likely to form the bulk of the applications submitted directly to the Secretary of State.
3. **Clause 2: Planning proceedings: costs etc** – The Bill provides for the Planning Inspectorate to be able to make an award of costs on its own initiative and not just on the application of one of the parties. In addition, the new provisions do enable the Planning Inspectorate itself to pursue costs to recover the Secretary of State's expenses from one or both of the parties in the event of, for example, unnecessary delay to proceedings. These provisions may have a number of unintended consequences, for example:
 - 3.1. They may distort the way in which the Inspector conducts proceedings at an inquiry, for example, in deciding whether or not to allow local opponents of a scheme to be heard.
 - 3.2. The greater risk of an award of costs or an award of the Inspectorate's costs, for example for the cancellation of an inquiry, could act as a disincentive to the parties to negotiate with a view to settling differences on a development so as to avoid the inquiry.
 - 3.3. The greater likelihood of an award of costs could increase the number of inquiries on the basis that an inquiry is (argued to be) necessary in the interests of fairness to permit

¹ [The Law Society \(2012\), Memorandum submitted to the Growth and Infrastructure Bill Committee, London: The Law Society](#)

evidence to be examined and thereby issues, which might otherwise lead to a costs award, to be clarified.

4. **Clause 5: Limits on power to require information with planning applications** – The Society welcomes this provision. The request for unreasonable information can be misused by LPAs who will use a ruling of insufficient information in order to avoid overshooting performance targets. However, the Society notes that careful guidance will be needed to avoid this provision becoming a new judicial review weapon for third parties to stall developments.
5. **Clause 6: Modification or discharge of affordable housing requirements** – The Society agrees that it is necessary to provide for the renegotiation of planning obligations entered into which, owing to the current economic climate, are no longer viable as this is posing an obstacle to development proceeding. If the objective of this Clause is to stimulate stalled development projects it appears odd that the relief is restricted to affordable housing provision.
6. **Clause 24: Bringing businesses and commercial projects within the Planning Act 2008 regime** – The Society recognises the rationale behind the bringing of additional projects within the major infrastructure regime but would question how this squares with the Government's localism agenda. The advantages will be undermined if the Planning Inspectorate is unable to process these projects expeditiously.

Part 2: Employee owners

7. The Law Society has raised a number of concerns about the likely costs and impacts of the proposed 'employee shareholder' status². In particular:
 - 7.1. **More red tape, not less-** The Society expects that small businesses, who are the prime target audience for this proposal, will be unlikely to take up a proposal which brings with it more, rather than less, 'red tape' in the form of complex tax and company law requirements.
 - 7.2. **Substantial risk of costly satellite litigation** - It is likely that the new status will cause confusion for employers at the outset, but particularly on termination of the employee's contract. There is potential for satellite litigation on a range of complex issues which are likely to arise on termination, which runs counter to the aim of supporting small and medium sized companies through simpler regulation.
 - 7.3. **Potential for claims of indirect sex discrimination** – This proposed approach to maternity rights and flexible working appears inconsistent with the Government's commitment to family-friendly policies. The proposals may have a discriminatory impact as female workers will still be able to make such requests outside this statutory amended scheme. Employers would have to take this into consideration to avoid allegations of indirect sex discrimination.
8. In addition, Members may wish to consider the Government's consultation on the proposals, which notes: 'a very small number of responses welcomed the scheme and suggested that they would be interested in taking in up' and, 'there was a particular concern that the new status would be complex and costly to operate'³.

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² [The Law Society \(2012\), *Implement Employee Owner Status: Law Society Response*, London: The Law Society](#)

³ [BIS \(2012\), *Implement Employee Owner Status: Government Response to Consultation*, London: BIS.](#)