

Enterprise and Regulatory Reform Bill

House of Lords Second Reading – Wednesday 14 November 2012

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

Introduction

The Enterprise and Regulatory Reform Bill provides for reform in a number of different areas including green investment, employment, competition, directors' remuneration and copyright. Many of the changes proposed in the Bill will have a substantial impact on the work of the legal profession.

This briefing, which has been prepared by members of the Society's specialist committees provides a summary of the Law Society's concerns with aspects of the Bill.

Part 2: Employment

1. Part 2 of the Bill implements a number of changes to the law surrounding the resolution of workplace disputes. The Society's Employment Law Committee have identified several areas of concern, which may impact on the effective functioning of Employment Tribunals and have a substantial impact on the parties who engage with the Tribunal process.
2. **Early conciliation** – The Bill introduces the requirement for all potential Employment Tribunal claims to be lodged with ACAS in the first instance. The Society supports an increased role for ACAS but is concerned that, unless clear accompanying guidance is given, there is the potential that the complexity of the proposals could lead to satellite litigation.
3. **Legal Officer determinations** – The Bill provides a new power for Legal Officers to make determinations in some (to be specified) Employment Tribunal Claims. The Society recognises the potential for Legal Officers to perform some duties, but stresses that they must be suitably qualified so as not to undermine their judicial position.
4. **Unfair dismissal compensatory award** – The Government is seeking a power to vary the compensatory award in line with annual average earnings. The Society queries the arbitrary nature of this limit, which will prevent a substantial number of claimants who have been unfairly dismissed from recovering their full losses.
5. **Financial penalties** – The Bill provides for Employment Tribunals to have a discretionary power to impose a financial penalty on employers who breach an individual's rights. At present the Bill does not define the aggravating features that may lead to a penalty being imposed. This should be rectified so that employers are not penalised for unintended shortcomings.
6. **Public Interest Disclosure Act** – The Government argue that the Bill closes a loophole in the Public Interest Disclosure Act, which at present allows for individuals to lodge a whistle blowing claim at an Employment Tribunal using a public interest argument in respect of a legal obligation owed only to him or her, for example in an employment contract. The current provision goes further than is required to close the loophole (identified in *Parkins v Sodexho*), and in fact requires that allegations about matters other than a simple breach of legal obligation (e.g. that a criminal offence has been committed) must fall within the public interest.

Party 6: Equality and Human Rights Commission

7. The Bill makes four changes to the Equality Act 2006 – the legislation that established the Equality and Human Rights Commission – to clarify its legislative remit.
 - 7.1. **Repealing the general duty at s. 3** – The general duty is necessary in order to avoid regulatory gaps or overlap. Rather than being repealed, it should be amended to establish more clearly the EHRC's overriding purpose, its powers and duties and to support the focus on being an equality regulator and a national human rights institution.
 - 7.2. **Progress reporting** – The Bill changes the requirement for the EHRC to report on progress from every three to every five years. To remain responsive to change, the three yearly requirement should remain. Should a five year cycle be introduced, it should be distinct from the electoral cycle to avoid unhelpful politicisation.
 - 7.3. **Repealing the good relations duty** – The duty should not be repealed, as it is important to ensure that the Commission has visibility among the public and private sectors and private individuals, and is thus central to its proper functioning.
 - 7.4. **Repeal of the power to make arrangements for conciliation** – The power should not be repealed. The EHRC's provision of conciliation services is highly valued by those who seek its guidance. Moreover, the Commission's wide caseload allows it to monitor closely the impact of legislation, and provides useful data on areas of equality/discrimination law.

Part 7: Civil liability and health and safety at work regulations

8. This measure will amend the Health and Safety at Work Act (HSWA) 1974 to remove the right of civil action against employers for a breach of statutory duty in relation to health and safety at work regulations unless such a right is explicitly provided for. This reverses the current presumption that regulations made under the HSWA carry civil liability, unless expressly excluded.
9. The Society is opposed to this measure, the consequences of which will be that:
 - 9.1. Safety standards for employees will fall. This is especially concerning at a time when the resources of the Health and Safety at Work Executive are being reduced;
 - 9.2. Fewer injured employees will be able to make a claim, with the consequence that the state will be required to take on the costs of their care;
 - 9.3. Those claims which do proceed will take longer and be more costly, as the process of proving negligence will increase complexity.
10. While the Society would agree that there is an over-abundance of rules, which can be unclear and complicated thus making it difficult for businesses to comply, this measure is a wholly disproportionate response. A more nuanced response is not to remove the right to compensation for breach of statutory duty, but to review all health and safety legislation with the objective of simplifying it and so making it easier for businesses to comprehend and comply with.

Part 11: Copyright

11. This section of the Bill makes a number of changes to the law in the area of intellectual property and copyright.

- 11.1. **Power to change exceptions** – The Bill permits the Secretary of State to make changes to copyright exceptions by Order. The Society considers that copyright exceptions are sufficiently important, and with serious enough possible ramifications, that changes to them should be subject to the full scrutiny of primary legislation. This section should therefore be deleted from the Bill.
- 11.2. **Licensing of orphan works** – The Society has a number of technical concerns regarding the drafting of these clauses, which we will elaborate on further ahead of the Committee Stage.

Part 12: Directors' pay

12. The Society's Company Law Committee have a number of technical concerns regarding these Clauses, which seek to change the governance arrangements surrounding directors' pay. Generally, there is a lack of clarity about how the provisions will operate in relation to long-term incentives. The Society would like to see greater clarity in the wording of these clauses so that they are brought more closely into line with the draft regulations.

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