

## The Enterprise and Regulatory Reform Bill

Monday 11 June 2012 – House of Commons, Second Reading

*The Law Society ('the Society') is the representative body for 145,000 solicitors in England and Wales. The Society negotiates on behalf of the profession, lobbies regulators, Government and others and has a public interest role in working for reform of the law*

### Key Points

The Enterprise and Regulatory Reform Bill ('the 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 provides a very brief introduction to the Law Society's position in relation to the Bill and covers only those areas where the Society has pressing concerns. It will be supplemented by a detailed briefing ahead of the Bill's Committee Stage.

- **Part 2: Employment** – The Society has several concerns about the impact of proposed reforms to employment law, in particular to the employment tribunal, on the quality of decision-making. In particular, the Society disagrees with the proposal to remove lay members from the Employment Appeals Tribunal.
- **Parts 3 and 4: Competition** – These parts establish the Competitions and Markets Authority, to subsume the work of the Office of Fair Trading and the Competition Commission. The Society will comment in detail on these sections ahead of the Committee Stage.
- **Part 5: Repeals** – This part makes provision to include sunset or review provisions in any secondary legislation, as well as making a number of amendments or repeals to various, mostly planning relating, laws. The Society will comment in detail ahead of the Committee Stage.
- **Part 6: Miscellaneous** – The Society is currently consulting its members on Clauses 55 and 56 of the Bill which relate to copy right reform and retains a strong interest in Clause 57, relating to directors remuneration.

### Part 2 - Employment

1. Part 2 of the Bill contains a number of employment law reforms, many of which were consulted on in the consultation [Resolving Workplace Disputes](#). The Society's detailed response to that consultation can be [read online](#). However, this section sets out the main changes.
2. **Clause 7: Pre-Claim Conciliation (PCC)** – The Bill imposes an obligation on prospective claimants, other than in certain circumstances, to submit details of their claim to the Advisory, Conciliation and Arbitration Service (ACAS), who will then try to achieve a settlement to the dispute within a prescribed period.
3. *The Society agrees that ACAS has a valuable role to play in helping parties to resolve their differences, that it is beneficial for parties to engage in settlement discussions at an early stage and that PCC may increase the prospect of settling a dispute that would otherwise proceed to the employment tribunal. However, the Society is concerned about the resourcing of the additional work by ACAS that the proposals will require. A firm commitment to resource ACAS's additional duties is required if the Bill's proposals are to prove workable.*
4. **Clause 10: Decisions by legal officers** – Amendments to the Employment Tribunal Act 1996 in the Bill would allow someone who is appointed as a 'legal officer' to determine certain proceedings (to be set out in secondary legislation) without the need for a hearing where the

parties consent in writing. These determinations will have the same status as if they had been determined by a judge or a judge and lay members.

5. *In the Society's view it is essential that, if posts of legal officer are to be created, the limits of delegation to such officers are clearly set out. While some interlocutory work (such as the postponement or adjournment of hearings and requests for orders where there has been a failure to comply with a direction of the tribunal) could be delegated to a suitably qualified legal officer, the Society would not endorse a proposal for legal officers to have the power to strike out claims for a failure to comply with an order or responsibility for listing a case for Hearing, for example. Such matters should be the responsibility of an employment judge, since only judges have the requisite mix of experience, common sense and good judgement that enable them to determine substantive matters expeditiously, efficiently and fairly.*
6. **Clause 11: Composition of Employment Appeal Tribunal (EAT)** – Under the Bill's provisions EAT cases will be heard by a judge sitting alone. A judge may order a matter to be heard by a judge and either two or four appointed members with an equal number of employer and worker representatives. A judge may also, with the consent of the parties, direct that the proceedings are to be heard by a judge and either one or three appointed members.
7. *The Law Society disagrees with this proposal. Operating a presumption that lay members would not be involved in EAT cases moves away fundamentally from the role of the employment tribunal as an industrial jury. Lay members offer invaluable support to the tribunal judge in terms of identifying evidential points and providing support to the judge in terms of discussing the evidence heard. The Society does not agree that a single judge would take less time over a case than a panel of three. For the most part lay members simply listen and only question witnesses briefly at the invitation, and subject to the direction, of the tribunal judge. In the Society's view, lay members add to the concept of justice which is beyond the pure legal analysis and they enhance the fairness of the tribunal by bringing practical experience in employer/employee relations.*
8. **Clause 13: Power of employment tribunal to impose financial penalty on employers** – Under the Bill a tribunal will have a discretionary power to impose a penalty of 50% of the damages awarded (subject to a minimum of £100 and a maximum of £5000) where there are 'aggravating factors'. What constitutes 'aggravating factors' is a matter for the tribunal, although the Explanatory Notes indicate that a tribunal may be more likely to find that the employer's behaviour had aggravating features where, for example, the action was deliberate or committed with malice.
9. *The Society is concerned that there may be a risk that financial penalties for breach of employment rights will provide employees with additional leverage in litigation to the detriment of employers and could therefore be perceived as 'weighting' the system against employers. Additional financial penalties might affect those small businesses that the proposals are intended to assist by weighing the scales against them further in terms of litigation exposure. The risk of an additional financial penalty will not be likely to be such a burden or commercial consideration in multiple or complex high value claims or, potentially, where the employer has greater resources. The administration required to enforce the relevant awards will reduce the benefit to the Exchequer.*

## **Part 5 - Copyright Reform**

10. **Clause 55: Design derived from artistic work** – Under UK law an artistic work has copyright protection for the lifetime of the creator plus 70 years. There is, however, an exception. Where a copy is made by an 'industrial process' copyright only lasts for 25 years. The Clause repeals s. 52 of the Copyright, Design and Patents Act (CDPA) 1988 to remove this exception.
11. *The Society notes that Clause 55, if passed, may require additional clarification of the meaning of a 'work of artistic craftsmanship' (WAC) under s. 4 of the CDPA. This is because*

*the current law on the definition of WACs is unclear to the extent that we cannot be confident that many of the categories of work to which the provision seeks to provide additional protection (such as design classics) would actually receive it. Conversely, designs clearly intended for mass production (for example, a chrome/leather chair typically used in an office environment but with sufficient distinction to be of interest to design museums) would gain protection for an extraordinarily long period.*

12. **Clause 56: Power to change exceptions: copyright and rights in performances** –Chapter 3 of Part 1 of the CDPA deals with ‘permitted acts’, that is, those acts which can be performed *without* the consent of the copyright owner. For example, criticism, review and news reporting or anthologies for educational use. Clause 56 creates a power for the Secretary of State to add or remove from this list of copyright exceptions by means of secondary legislation.
13. *The Law Society considers that copyright exceptions are a sufficiently important issue, with ramifications across many sectors and industries, that changes to them should be subject to the full scrutiny of the primary legislative process. The Society therefore opposes the inclusion of this Clause.*

### **Director’s Remuneration**

14. **Clause 57: Director’s remuneration: effect of remuneration report** – Clause 57 repeals section 439(5) of the Companies Act 2006, which states that ‘no entitlement of a person to remuneration is made conditional on the resolution being passed by reason only of the provision made by this section’. The effect of s. 439(5) is to prevent shareholders from having a binding vote on a companies remuneration policy.
15. *The Law Society retains an interest in the reform of legislative provisions on directors’ remuneration. The Society is currently consulting its members and will provide more substantial briefing ahead of the Committee Stage.*

### **Summary**

16. The Enterprise and Regulatory Reform Bill is a substantial Bill which introduces reforms in a number of areas. The Society’s main areas of concern relate to proposed reforms to employment law, in particular changes to the composition of the employment tribunal, and also to the extension of the Secretary of State’s power in relation to copyright law.
17. The Society is currently consulting its members, many of whom are experts on many of the areas covered in this Bill, and will produce a comprehensive briefing ahead of the Committee Stage.

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