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[Publications on the internet](#)[Other Bills before Parliament](#)[Arrangement of Clauses \(Contents\)](#)

Legislative and Regulatory Reform Bill

These notes refer to the Legislative and Regulatory Reform Bill as introduced in the House of Commons on 11 January 2006 [Bill 111]

LEGISLATIVE AND REGULATORY REFORM BILL

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Legislative and Regulatory Reform Bill as introduced in the House of Commons on 11 January 2006. They have been prepared by the Cabinet Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

3. Part 1 provides a power for a Minister of the Crown to make orders, which replaces the power in the Regulatory Reform Act 2001 ("the 2001 Act") to make Regulatory Reform Orders ("RROs"). It sets out the type of provision that can be made, the conditions and restrictions on the power, and the procedure which must be followed in making such an order.
4. The impetus for this Part comes from the Government's review of the first four years of the operation of the 2001 Act, which was completed in July 2005¹. The review was informed by detailed feedback from Government departments which have been involved in the making of RROs under the 2001 Act, and by the findings of the Better Regulation Task Force ("the Task Force") contained in its report *Less is More: Reducing Burdens, Improving Outcomes*, published in March 2005². The Task Force's report (at page 42) made some recommendations as to what the Government's review of the 2001 Act should cover.

¹ *Review of the Regulatory Reform Act 2001* (Cabinet Office, July 2005)

² From 1 January 2006 the Better Regulation Commission took over the duties of the Better Regulation Task Force.

5. The review concluded that the 2001 Act presented a number of hurdles which inhibited the production of RROs; in particular that the powers in the 2001 Act were too technical and limited, that the scope of RROs should be extended to deliver non-controversial proposals for simplification and that the whole process for delivering an

[Bill 111-EN] 54/1

RRO and subsequent scrutiny could be made more proportionate. Part 1 implements proposals developed as a result of the conclusions reached in the review.

6. The provisions in Part 2 are intended to promote more effective inspection and enforcement by regulators and to ensure that they exercise their functions in a way that is consistent, coherent and proportionate without compromising regulatory standards or outcomes. In order to achieve this, the Bill establishes statutory principles of good regulation, based on the Better Regulation Commission's Principles of Better Regulation, to which those regulators specified by order, must have regard. These statutory principles will also inform a Code of Practice issued by the Minister which the specified regulators must have regard to when undertaking their regulatory functions.

7. Part 2 has its origins in the recommendations of a review entitled *Reducing administrative burdens: effective inspection and enforcement*, which the Government appointed Mr Philip Hampton to lead. The review's recommendations, accepted in full by the Government, were aimed at promoting effective, risk-based enforcement and were published in a report in March 2005 ("the Hampton Report").

8. Part 3 makes provision about legislation relating to the European Communities. In the first place it amends the Interpretation Act 1978 ("the 1978 Act") to make provision about references in domestic legislation to Community instruments; and to make provision about references in domestic legislation relating to the "European Economic Area" and "European Economic Agreement". In the second place, Part 3 makes provision about how Community obligations are implemented in domestic law, in order primarily to reduce the number of domestic instruments that need to be made. Technical provisions intended to improve the way in which Community law is implemented in domestic legislation were incorporated in the European Union Bill currently before Parliament, but since the Government has not yet set a date for the Second Reading of that Bill, these provisions are instead included in this Bill.

9. Part 4 contains supplemental and general provision, and the Schedule to the Bill details the legislative provisions which are repealed by the Bill.

TERRITORIAL EXTENT

10. This Bill extends to the whole of the United Kingdom, subject to the provisions of clause 32.

TERRITORIAL APPLICATION: WALES

11. The Bill applies in relation to Wales and includes provisions that relate specifically to the powers of the National Assembly for Wales ("the Assembly").

12. Part 1 of the Bill provides, at clause 9, that an order may not make any provision conferring a function on the Assembly, modifying or removing a function

of the Assembly, or restating any provision that confers a function on the Assembly, without the agreement of the Assembly.

13. Where the agreement of the Assembly is not required under clause 9, a Minister proposing to make an order under the power in Part 1 must consult the Assembly in accordance with clause 11 where the proposals, insofar as they apply to Wales, relate to any matter in relation to which the Assembly exercises functions.

14. In Part 2 of the Bill, clause 22 provides that a Minister may specify, by order, which regulatory functions (as defined in clause 23) are covered by the Principles and Code of Practice (clauses 19 and 20). However, a Minister may not specify a regulatory function that is exercisable only in or as regards Wales: instead the power is conferred on the Assembly and any such functions may be specified, by order, by the Assembly.

15. Part 3 of the Bill contains provisions dealing with legislation relating to the European Communities. Clause 26, which makes provision to include a power in section 2 of the European Communities Act 1972 ("the 1972 Act") to make orders, rules and schemes in addition to regulations, is the only clause in that Part that has separate provision in respect of Wales. Subsection (3) of clause 26 contains an amendment to the Government of Wales Act 1998 consequential on the amendment made by subsection (1). Subsection (6) further provides that the powers of a Minister of the Crown to make an order under subsection (5) to amend enactments or subordinate legislation referring to regulations made under section 2(2) of the ECA 1972 to include a reference to any order, rules or scheme, shall also be exercisable by the Assembly, insofar as it relates to a matter in respect of which functions are exercisable by the Assembly. This power is to be exercisable by statutory instrument (subsection (7)).

COMMENTARY ON CLAUSES

Part 1 - Power to reform legislation etc

Order-making power

Clause 1 - Purpose

16. Clause 1 provides a power for a Minister of the Crown to make provision, by order, for either or both of the following two purposes.

17. First, an order can make provision reforming legislation. 'Legislation' is defined in subsection (3) and includes local as well as public general Acts, and subordinate legislation as well as primary legislation. (It does not include any instrument which is Northern Ireland legislation within the meaning of section 24 of the Interpretation Act 1978, such as Northern Ireland Acts, or Orders in Council made under s 1(3) of the Northern Ireland (Temporary Provisions) Act 1972.)

18. Secondly, an order can make provision implementing recommendations of the Law Commission, the Scottish Law Commission or the Northern Ireland Law Commission. The power enables a Minister to implement a set of recommendations, in full or in part, and for the provision made by the order to depart from the recommendations.

19. The Law Commission and the Scottish Law Commission were set up under the Law Commissions Act 1965. The Northern Ireland Law Commission is created under section 50 of the Justice (Northern Ireland) Act 2002, which has yet to be brought into force. It is expected that it will be brought into force in 2007.

Clause 2 - Provision

20. Clause 2 specifies what provision can be made by orders under clause 1.

21. Orders can amend, repeal, or replace any legislation. "Replace" means that legislation may be repealed by an order made under clause 1 and may be replaced by free-standing provision in the order.

22. Subsection (2) provides that an order made under clause 1 can amend, repeal or replace legislation in any way that an Act of Parliament may do, including conferring functions (expressly including the function of legislating). Provision made by order can also modify existing functions or transfer functions to another person.

23. Where an order is implementing recommendations of the Law Commission, as well as being able to make

provision reforming legislation, it can also amend or abolish any rule of common law, or codify common law rules.

24. It will be possible, within the same order, to implement Law Commission recommendations *and* to reform legislation where this goes wider than those recommendations. However, an order cannot make provision amending, abolishing or codifying common law rules if this is not for the purpose of implementing a Law Commission recommendation.

25. Subsection (4) confers the power for an order to make such consequential, supplementary, incidental or transitional provision as the Minister considers appropriate. This power includes power to make provision amending, repealing or replacing legislation as defined in clause 1, and to make other provision including amending, repealing or replacing Acts of the Scottish Parliament and Scottish statutory instruments.

26. Annex A to these Explanatory Notes sets out a few examples of some of the ways in which it is anticipated that the order-making power may be used.

Clause 3 - Preconditions

27. Clause 3 imposes conditions on the order-making power. Where an order contains provision amending, repealing or replacing any legislation (under clause 2(1)) and is not merely restating legislation (as defined in clause 18), or where it contains provision amending or abolishing any rule of law (under clause 2(3)(a)),

there are five conditions which, where they are relevant, the Minister must consider are met before making an order. These are set out in subsection (2)(a) to (e).

28. The first condition is that there are no non-legislative solutions which will satisfactorily remedy the difficulty which the order is intended to address.

29. The second condition is that the effect of the provision made by the order is proportionate to its policy objective. This means that the Minister must consider that there is an appropriate relationship between the policy aim of the proposals and the means chosen to achieve them.

30. The third condition is that the provision made by the order, taken as a whole, strikes a fair balance between the public interest and the interests of the persons adversely affected by the order. So it will be possible to make an order which will have an adverse effect on the interests of one or more persons only if the Minister is satisfied that it will also have adequate beneficial effects which are in the public interest.

31. The fourth condition is that the provision made by the order does not remove any necessary protection. This condition is the same as one of the safeguards in section 3 of the 2001 Act. No order can be made unless the Minister is of the opinion that it would maintain any protections that the Minister considers to be necessary.

32. The fifth condition is that the provision made by the order will not prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise. This condition is also the same as one of the safeguards in section 3 of the 2001 Act. It recognises that there are certain rights that it would not be appropriate to take away from people using an order, and has certain parallels with the concept of 'legitimate expectation'.

33. The Minister is also required to set out in the explanatory document (clause 12) laid before Parliament why he considers that these conditions are met.

34. Subsections (3) and (4) impose a separate condition which applies where an order makes provision under clause 2(1) which merely restates legislation, or codifies rules of common law (under clause 2(3)(b)). The Minister may only make provision of this type in an order if he is satisfied that the provision contained in the order would

make the law more accessible or more easily understood. For example, if an order consolidated various disparate pieces of legislation or restated existing provision in accordance with modern drafting practices, this condition would be satisfied. The five conditions in subsection (2) do not apply to an order to the extent that it is only restating legislation or codifying a rule of law.

Restrictions

Clause 4 - Subordinate legislation

35. The power to make orders amending, repealing or replacing any legislation is specified in clause 2(2) as being a power to make orders which do anything that may be done by Act of Parliament, including conferring functions on any person, or modifying or transferring any such functions. The power to confer functions expressly includes conferring a function of legislating. Clause 4 places certain restrictions on orders which confer a function of legislating on a Minister of the Crown. The condition in subsection (2) is that where such a function is conferred by an order on a Minister, the function must be exercised by statutory instrument. The condition in subsection (3) is that such a statutory instrument must be subject to either the negative resolution procedure or the affirmative resolution procedure.

36. It will be necessary for the Minister, when laying an explanatory document before Parliament in accordance with the requirements of clause 12, to explain the reasons for conferring a new function of legislating and to justify the Parliamentary procedure specified in relation to it. To 'legislate' is defined in clause 18.

37. The conditions in clause 4 do not apply to an order conferring a function of legislating on someone other than a Minister, for example where the function of making bylaws is conferred on a local authority. Neither do they apply to provision in an order which is merely restating legislation.

Clause 5 - Taxation

38. This clause prohibits an order which is amending, repealing or replacing any legislation from imposing or increasing taxation (unless the order is merely restating legislation as defined in clause 18).

Clause 6 - Criminal penalties

39. This clause sets out the limitations on the order-making power in relation to the creation of new criminal offences and the increasing of penalties for existing criminal offences, maintaining the limits which were in the 2001 Act. However these restrictions do not apply to the extent that the order is implementing Law Commission recommendations which could impose penalties higher than the restrictions set out (subsection (6)). Neither do they apply where the order is merely restating legislation.

Clause 7 - Forcible entry etc

40. The restriction in clause 7(1) on making provision authorising forcible entry, search or seizure, or compelling the giving of evidence, derives from the 2001 Act (section 3(5)). Subsection (2) of the clause enables an order to contain a provision which extends a pre-existing power to do any of the things set out in subsection (1), but only where the power is extended for purposes similar to those to which the power applied before the order was made. The restriction in subsection (1) does not apply to

the extent that the provision is implementing Law Commission recommendations, or is merely restating legislation (subsection (3)).

Devolution

Clause 8 - Scotland

41. The power in clause 1(1)(a) to make orders reforming legislation does not extend to Acts of the Scottish Parliament or instruments made under them, except in circumstances where clause 2(4) applies (where the order is making consequential, supplementary, incidental or transitional provision). However, it does extend to all Acts of the Westminster Parliament, and such Acts can make provision about devolved matters (having been passed prior to the passing of the Scotland Act 1998 or, in some cases, afterwards). Clause 8 prevents the power being used in relation to such Acts or statutory instruments, except for consequential, supplementary, incidental or transitional purposes.

Clause 9 - Wales

42. Clause 9 provides that the agreement of the Assembly is required for any order that confers a function on the Assembly, or removes or modifies any function of the Assembly, or restates a provision conferring a function on the Assembly.

Procedure

Clause 10 - Procedure: introductory

43. Clause 10 sets out procedural requirements for making an order under clause 1. In particular, it introduces three alternative parliamentary procedures for the order - the negative resolution procedure, the affirmative resolution procedure, and the super-affirmative procedure.

Clause 11 - Consultation

44. This clause sets out the consultation process which the Minister must follow before making an order under clause 1. The persons or bodies that the Minister must consult depend on the subject matter of the proposals and who is likely to be affected by them. This includes consultation of the Law Commissions where the order proposes to implement their recommendations. Subsection (1)(e) is a general requirement that the Minister consult persons other than those listed in (a) to (d) if he considers that they ought to be consulted.

45. Subsection (2) reflects the fact that the Law Commission is likely to have carried out consultation with affected persons and bodies. Where the provision made by the order is implementing Law Commission recommendations with *no material changes*, the Minister is not required to carry out the consultation specified in subsection (1), but instead must carry out such consultation as he considers appropriate bearing in mind the consultation carried out by the Law Commission(s). As a result, the Law Commission's own consultation in developing its recommendations may make it unnecessary for the Minister to carry out further consultation. If the order is implementing Law Commission recommendations but with material changes, the consultation requirements in subsection (1) must be complied with.

46. Subsection (3) specifies that if the Minister varies his proposals as a result of the consultation he has undertaken, then he must carry out such further consultation on the changes he has made, as he considers appropriate. The Minister does not therefore have to repeat the whole consultation exercise; the additional consultation is only in respect of those elements of his proposal that he has changed and might involve only those consultees affected by the change.

47. Subsections (4) and (5) are transitional provisions. They deal with consultation which has taken place before the date on which these clauses come into force. If any consultation is undertaken before subsection (4) comes into force, and that consultation would to any extent satisfy any of the requirements of clause 11 (if the consultation had taken place after it comes into force), those requirements are, to that extent, taken to have been satisfied. It is not necessary therefore to repeat the consultation. Subsection (5) applies specifically where the power in the 2001 Act has been repealed at the time an order is to be made. In those circumstances, where proposals for an order under clause 1 of this Bill are the same as proposals for an order under section 1 of the 2001 Act and those proposals have

been consulted upon under that Act, then consultation will be taken to have been satisfied for the purposes of this clause (even where the proposals have been varied following consultation under the 2001 Act and it was appropriate that no further consultation be undertaken). This means that such proposals do not need to be consulted on again where an order was going to be made under the 2001 Act but is now going to be made under clause 1 of this Bill.

Clause 12 - Draft order and explanatory document laid before Parliament

48. This clause sets out the requirement for a Minister to lay before Parliament a draft of the order he wishes to make, along with an explanatory document. The explanatory document for all orders must cover the matters listed in subsection (2). These include the Minister's consideration of the preconditions in clause 3, and information about the consultation he has undertaken.

49. Subsection (2)(d) requires the Minister (to the extent that it is appropriate to do so having regard to the likely effect of the order) to provide an assessment of the savings or the increase in costs likely to result from the provision made by the order, and the other benefits and disbenefits of the provision. The requirement to make and give such an assessment is intended to be proportionate to the nature of the order being made, and in some cases the effect of the order will be minor and will not merit this kind of detailed assessment, in which case a brief statement of any relevant impacts will be included in the explanatory document to the order. Where appropriate it is expected that, in practical terms, the assessment required by (2)(d) may take the form of a Regulatory Impact Assessment.

50. It is also anticipated that in many cases the analysis required to demonstrate compliance with clause 3 and for the Minister to give his opinion of whether the order has the effects described in clause 12(3) may be given in the Regulatory Impact Assessment signed by the Minister.

51. Subsection (2)(e) requires the Minister to identify and give reasons for any powers to legislate conferred by the order, and what procedural requirements will have to be complied with when the power to legislate is exercised.

52. Subsection (3) specifies further detail which must be included in the explanatory document where the order being made is reforming legislation under clause 1(1)(a) and where the Minister considers that the proposed order would have any of the three effects listed in this subsection. If he does not consider that the order would have any of these effects, he does not need to say anything about them. The effects referred to in subsection (3) are:

- simplifying or modernising legislation,
- making the overall effect of legislation less onerous (for example by reducing the costs or administrative burden of compliance with a particular regulatory regime)
- removing inconsistencies or anomalies in existing legislation.

53. Subsection (4) specifies further detail which must be contained in the explanatory document when the order being made is implementing Law Commission recommendations under clause 1(1)(b). These are identifying the recommendations being implemented, the manner in which the order intends to implement the recommendations and details of any differences between the recommendations and the Minister's proposals.

54. Subsections (5), (6) and (7) set out provisions concerning the disclosure of representations made in response to consultation under clause 11. Where a person makes representations in response to consultation and asks the Minister not to disclose those representations, the Minister must not disclose where such disclosure would constitute an actionable breach of confidence by any person. The Minister need not disclose information contained in representations relating to another person if it appears to him that such disclosure could adversely affect the interests of that other person and he has been unable to obtain the consent of that person. It should be noted that subsection (7) provides that these provisions do not affect any disclosure that is requested by, and made to, a Parliamentary committee charged with reporting on draft orders.

Clause 13 - Determination of Parliamentary procedure

55. This clause sets out the procedure for determining which of the three alternative types of parliamentary procedure will apply to an order.

56. Subsections (1) and (2) require that the explanatory document laid by the Minister must contain his recommendation as to which Parliamentary procedure should apply and his reasons for this recommendation. This will depend on his view of the complexity of the order and the level of scrutiny it should be subject to.

57. Subsections (3) to (5) provide that the Minister's recommendation for a procedure shall apply unless either House of Parliament requires that a more onerous procedure shall apply.

58. The procedure is that when a Minister lays a draft order, he will make a recommendation as to the appropriate procedure in the explanatory document laid with the draft order. In the 21-day period following this, either House can require that a more onerous Parliamentary procedure shall apply. Subsection (5) sets out the two different ways in which a House is taken to have required a particular procedure. A House may either require a procedure by making a resolution, or a committee of that House, which is responsible for reporting on orders made under clause 1, may recommend a procedure, which takes effect where such recommendation is not subsequently rejected by a resolution of the House. Both the recommendation of the committee and any resolution of the House rejecting it must be made within the 21-day period in order to determine the procedure which will apply to the order.

59. If the Minister recommends the negative resolution procedure, this will apply unless either House requires the affirmative resolution or super-affirmative resolution procedure, in which case that higher level of procedure will apply instead. Similarly, if the Minister recommends the affirmative resolution procedure, that will apply unless, within 21 days, either House requires the super-affirmative procedure (in which case that will apply instead). If the Minister recommends the super-affirmative procedure from the start, that is the procedure which will apply.

60. In effect, either House is able to require which level of procedure they consider appropriate, although it should be noted that the committees can require a higher, but not a lower, level of procedure. The 21-day period is defined in subsection (6). Parliamentary scrutiny of RROs is currently undertaken by the House of Commons Regulatory Reform Committee and the House of Lords Delegated Powers and Regulatory Reform Committee.

[Contents](#)

[Continue](#)

[Commons](#)

[Parliament](#)

[Lords](#)

[Search](#)

[Enquiries](#)

[Index](#)