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Select Committee on the Constitution

11th Report of Session 2005–06

**Legislative and
Regulatory Reform
Bill**

Report with Evidence

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Select Committee on the Constitution

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Legislative and Regulatory Reform Bill

INTRODUCTION

1. Our terms of reference are to “examine the constitutional implications of all public bills before the House; and to keep under review the operation of the constitution”. The Legislative and Regulatory Reform Bill, which was introduced to the House on 17 May, has aroused controversy within Parliament¹ and outside. It was first introduced in the House of Commons on 11 January, and it was immediately clear to us that it was a bill of first class constitutional significance. In January 2006, and before second reading in that House, our Chairman wrote to the Lord Chancellor, “the Government’s guardian of the constitution”, to express our disappointment that the bill had not been published in draft and to record our concern that there was risk of inadvertent and ill-considered constitutional change.² The bill’s potential impact was explained by six Cambridge law professors, who said “It would, in short, create a major shift of powers within the State, which in other countries would require an amendment to the constitution; and one in which the winner would be the executive, and the loser Parliament”.³ On more than one occasion, the bill was referred to as “the Abolition of Parliament Bill”.
2. Since then, the bill has been substantially amended in the House of Commons. The Government has conceded that the delegation by Parliament of widely drawn powers to Ministers to change the statute book for the broad purpose of “reforming legislation” is excessive for the avowed purposes of the bill. With cross-party support, that provision has been replaced with powers in Part 1 of the bill which are intended to be exercised only for purposes related to better regulation (clauses 1 and 2 described below). The bill has also been amended to include an express power for committees of each House to recommend on certain specified grounds that a draft order be not proceeded with by the Minister (clauses 17(4), 18(3), and 19(5)). A further amendment prevents Part 1 powers to change the statute book being exercised in relation to Part 1 of the Legislative and Regulatory Reform Act itself or the Human Rights Act 1998 (clause 9).
3. Nonetheless, the bill continues to give rise to questions of principle about principal parts of the constitution. We concur with the statement of the Parliamentary Under-Secretary for the Cabinet Office (Mr Pat McFadden MP), made in the final stages of the bill’s passage in the House of Commons:

¹ Other committees have reported on the bill: First Special Report from the Regulatory Reform Committee, Session 2005–06, Legislative and Regulatory Reform Bill, HC 878. Second Special Report from the Regulatory Reform Committee, Session 2005–06, Government’s Response to the First Special Report on the Legislative and Regulatory Reform Bill, HC 1004. First Report from the Procedure Committee, Session 2005–06, Legislative and Regulatory Reform Bill, HC 894. Seventeenth Report from the Joint Committee on Human Rights, Session 2005–06, Legislative Scrutiny: Eighth Progress Report, HC 1062. Third Report from the Public Administration Select Committee, Session 2005–06, Legislative and Regulatory Reform Bill, HC 1033.

² The correspondence is reproduced at Appendix 1, below.

³ The Times 16 February 2006.

“Our subject matter is sensitive, because it [is] not just about what the Government of the day might want; it also takes us into the realm of the relationship between Government and Parliament, and Parliament’s proper role in the scrutiny and approval of Government proposals in this sphere”.⁴

4. We make this report to draw the following issues of constitutional importance to the attention of the House.
 - The manner in which the bill has been introduced, which raises concerns about the Government’s approach to legislation with constitutional implications.
 - The bill delegates power to Ministers to change the statute book. When this was last done, in the Regulatory Reform Act 2001, the enabling provision was described as an “unprecedentedly wide power”.⁵
 - The bill delegates power to Ministers to change the statute book for the purposes of implementing Law Commission recommendations.
5. It will be for the House as a whole to determine whether the proposed delegation of these powers to Ministers is balanced with sufficient constitutional safeguards against inappropriate use. That assessment will need to have regard to the manner in which the delegated power is framed, the stated purposes for which Ministers may exercise their powers, the subject matter that is exempt from amendment or repeal by order, and the parliamentary procedures specified in the bill. **Our assessment is that although the bill now strikes a somewhat better balance than when first introduced to the House of Commons, the powers contained in the bill remain over-broad and vaguely drawn and there are further safeguards that could be accommodated in the bill which are necessary and would not jeopardise the achievement of the Government’s better regulation goals.**

AIMS OF THE BILL

6. Before examining the constitutional issues, it is necessary to describe in outline the bill as introduced to the House of Lords. The bill has three main aims. First, it seeks to develop the programme of deregulation, now “better regulation”, begun by the Deregulation and Contracting Out Act 1994 and modified by the Regulatory Reform Act 2001. Secondly, the bill seeks to provide a new method of legislating to give effect to recommendations of the United Kingdom’s three Law Commissions (the independent bodies responsible for law reform). Thirdly, the bill makes technical changes to drafting techniques used in domestic legislation which implements or refers to certain types of European Union legal instruments.

Part 1 of the bill: Order-making Powers

7. Part 1 would replace the order-making power currently contained in the Regulatory Reform Act 2001 (“the 2001 Act”) by which a Minister may, by order, repeal or amend provisions of Acts of Parliament so as to remove or

⁴ HC Hansard, 15 May 2006, col 698.

⁵ The words of the Delegated Powers and Regulatory Reform Committee in December 2000: see 2nd Report, 2000–2001, HL Paper 8, para.21.

reduce “burdens affecting persons in the carrying on of any activity” (section 1(3) of the 2001 Act). A review by the Government during 2005 of that provision reached the conclusion that this power to make such Regulatory Reform Orders (RROs) was too technical and limited and that in relation to smaller-scale reforms, parliamentary scrutiny procedures were disproportionate. It concluded that “Overall, the [2001] Act has not achieved its original intention. Its ability to deliver better regulation measures is not as wide-ranging as hoped and the number of reforms delivered is significantly lower than expected”.⁶ Up to July 2005, 27 RROs had been made under the 2001 Act.

8. When the bill was introduced to the House of Commons in January 2006, the breadth of Ministers’ powers to change the statute book was astonishingly wide. Leaving aside the provision relating to implementing Law Commission recommendations (which we deal with separately, below), the bill originally stated that the purpose for which Ministers’ powers could be used was “reforming legislation” (clause 1 of Bill 111). This was a tautologous definition which established no effective legal boundaries to the scope of the power. Had this provision become law, it would have eroded the principal difference between an order made by a Minister under delegated powers and an Act of Parliament, namely that a Minister’s powers, unlike Parliament’s, are limited.
9. Following a great deal of criticism, the Government conceded that this power was too widely drawn. This clause was removed in the final stages of the bill’s consideration in the House of Commons. The bill as introduced to the House of Lords now defines three purposes for which a Minister may make an order to change the statute book:
 - to reduce “any burden, or the overall burdens, resulting directly or indirectly from any legislation” (clause 1)
 - to secure that regulatory functions are exercised so as to comply with the principles that (a) they should be carried out in a way which is transparent, accountable, proportionate and consistent; (b) regulatory activities should be targeted only at cases in which action is needed (clause 2).
 - to implement recommendations of any one or more of the United Kingdom Law Commissions, with or without changes (clause 3).
10. Appendix 2 to our report sets out a table comparing the order-making powers of Ministers under the 2001 Act in relation to regulation and those in the bill. The Minister making the order must be satisfied that several conditions are met before making an order (clause 4). The Minister must also carry out consultation (clause 14).
11. Under the 2001 Act, all such orders are subject to the “super affirmative resolution procedure”.⁷ This provides the most intensive kind of parliamentary scrutiny available for ministerial orders. The bill seeks to introduce a degree of proportionality between the importance of the proposed change to the statute book as perceived by the Minister and the

⁶ Cabinet Office (Better Regulation Executive) *A Bill for Better Regulation: Consultation Document* (July 2005).

⁷ House of Commons Standing Order 141.

degree of parliamentary scrutiny the order proposing the change receives. Under the bill, the Minister will be able to recommend one of three procedures: negative resolution procedure (clause 17);⁸ affirmative resolution procedure (clause 18); or the super-affirmative resolution procedure (clause 19). An outline of the procedures is set out in Table 1, below.

12. There will be three main moments of opportunity for Parliament to object to a draft order. First, there will be a 30-day period during which either House of Parliament may insist on a greater degree of scrutiny if the Minister recommends the negative or affirmative resolution procedure (clause 16).
13. Secondly, a select committee in each House⁹ has a qualified veto over the legislative proposal proceeding as a draft order (rather than a bill). In reaching such a decision, the committees are expressly limited to having regard to three factors.
 - That the draft order “does not serve the purpose” of removing or reducing burdens, promoting regulatory principles, or implementing Law Commission recommendations.
 - That the conditions in clause 4(2) are not met. These are that: (a) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means; (b) the effect of the provision is proportionate to the policy objective; (c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it; (d) the provision does not remove any necessary protection; and (e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.
 - That the draft order does not meet the condition that it will make the law more accessible or more easily understood (clause 4(5)).

The recommendation of either select committee will prevent further progress being made on the draft order unless, in the same session, that recommendation is rejected by the relevant House.

14. The third opportunity to reject a draft order is at the conclusion of the parliamentary procedure where (in the case the negative resolution procedure) a “prayer” may be made calling for the draft order to be annulled, or there is a resolution to affirm the order (in the case of the affirmative and super-affirmative procedures).

⁸ The Statutory Instruments Act 1946 prescribes the general procedure. In the House of Commons, a prayer put down by a backbench MP is unlikely to be debated. “A motion put down by the Official Opposition will often be accommodated although there is no absolute certainty of this” (House of Commons Information Office, *Statutory Instruments: Factsheet 7* p 4). In the House of Lords, an individual Member may table a prayer, and these are usually debated though rarely put to the vote.

⁹ Debate in the House of Commons assumed that the designated select committees would be the Regulatory Reform Committee (in the House of Commons) and the Delegated Powers and Regulatory Reform Committee (in the House of Lords).

TABLE 1
Varying degrees of scrutiny

| | | | |
|---|---|--|---|
| Minister's choice of procedure | Negative resolution procedure (clause 7) | Affirmative resolution procedure (clause 18) | Super-affirmative resolution procedure (clause 19) |
| Laying the draft order ¹⁰ | Minister lays draft order before Parliament for 40 days | Minister lays draft order before Parliament for 40 days | Minister lays draft order before Parliament for 60 days |
| Determination of procedure | Within 30 days, either House may require affirmative or super-affirmative procedure to be used (clause 16(3)) | Within 30 days, either House may require super-affirmative procedure to be used (clause 16(4)) | Super-affirmative will be used (clause 16(5)) |
| Veto over use of order-making power | After 30 days and before 40 days, a select committee of either House may, on specified criteria, recommend that no further proceedings be taken in relation to draft order (clauses 17(4), 18(3)) | | Select committee of either House may, at any time before the draft order is approved, recommend on specified criteria that no further proceedings be taken (clause 19(5)) |
| Possible reversal of veto | Either House may by resolution reject its select committee's recommendation (clause 17(6), 18(5), 19(7)). Unless the veto is removed, the Minister may not proceed with the order in that House. | | |
| Select committee scrutiny of draft order where there is no dispute about order-making procedure | No express provision in the bill requiring Minister to have regard to recommendations of the select committees | | Designated select committees in each House may make recommendations on draft order, to which the Minister must have regard (clause 19(2)(c)) |
| Parliamentary procedure | If after 40 days no Member of either House proposes a motion to annul | After 40 days, a motion to approve the draft order is moved in both | After 60 days the Minister lays a draft order before Parliament |

¹⁰ See clause 15 of the bill. The term "lay" means that a copy of the order is placed with the Votes and Proceedings desk in the Journal Office.

| | | | |
|--|---|--|--|
| | the draft order (called a “prayer”), the Minister may make ¹¹ the order (clause 17(3)) | Houses of Parliament If each House resolves to affirm the order, the Minister may make the order (clause 18(2)) | (clause 19(8)). If the order is laid in a revised form, the Committee procedure is repeated (clause 19 (8)). A motion to approve the draft order is then moved in both Houses of Parliament If each House resolves to affirm the order, the Minister may make the order |
|--|---|--|--|

15. The ministerial powers to change the statute book are subject to various substantive limitations. An order seeking to change to the statute book:

- must not “remove any necessary protection” (clause 4(2)(d));
- must not “prevent any person from continuing to exercise any right or freedom which the person might reasonably expect to continue to exercise” (clause 4(2)(e));
- cannot “impose or increase taxation” (clause 6);
- cannot create a new criminal offence punishable by more than two years imprisonment or a fine exceeding level 5, which is currently set at £5,000 (clause 7);
- cannot increase penalties for existing offences beyond those tariffs (clause 7);
- cannot “authorise any forcible entry, search or seizure” (clause 8(1)(a));
- cannot “compel the giving of evidence” (clause 8(1)(b));
- cannot be used to repeal or amend Part 1 of the Legislative and Regulatory reform bill itself (clause 9(a));
- cannot be used to repeal or amend the Human Rights Act 1998 (clause 9(b)).
- In order to assuage fears that “the order-making power could be used by Ministers suddenly to stop providing public services” (which might be taken to constitute a “burden”), the bill does not apply to “any burden which affects only a Minister of the Crown or government department” (clause 1(4)).¹²

¹¹ The term “made” means that the order is signed by the Minister with authority to do so under the enabling Act. A recent academic study found that “for most purposes ministerial approval is generally sought [by civil servants] not from the Cabinet minister responsible for the ministry but from a junior minister”: Edward C Page *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (Hart Publishing, Oxford, 2001) p 87.

¹² HC Hansard, 16 May 2006, col 708.

Part 2 of the bill: Regulators

16. This part of the bill seeks to give Ministers powers to issue guidance in the form of a code of practice to bodies carrying out statutory regulatory functions (which are defined in clause 31). The principles to be promoted through the code of practice are transparency, accountability, proportionality and consistency as principles to be secured by statutory regulators. This is a matter of broad constitutional importance on which we have reported to the House previously;¹³ we do not in this report engage with the substance of the bill's aims.

Part 3 of the bill: Legislation relating to the European Communities etc

17. Part 3 of the bill inserts two new provisions into the Interpretation Act 1978 (which gives general guidance to the courts and others on the construction and operation of United Kingdom legislation). Clauses 27 and 28 deal with how reference is made in domestic legislation to certain legal instruments relating to the European Union and to EEA States. The changes are technical, designed to assist both the draftsmen and the readers of legislation, and raise no constitutional issues.
18. Clause 29 amends the European Communities Act 1972 to provide for a wider range of delegated legislation and quasi-legislation to be used to implement obligations under European Union law into domestic law. At present, this may be achieved by means of primary legislation (relatively rarely) or (normally) by means of a regulation. In the United Kingdom, delegated legislation comes in various forms—including regulations, orders, and rules (all of which may be referred to collectively, for most purposes, as “statutory instruments”). There is no significant legal difference between regulations, orders, rules and other forms of delegated legislation. The variation in terminology is largely explained as being due to historic differences in the terms used by enabling provisions in Acts and drafting practices.¹⁴ The bill amends the 1972 Act to provide flexibility to the draftsmen. No significant constitutional issues arise.

THE GOVERNMENT'S APPROACH TO LEGISLATION WITH CONSTITUTIONAL IMPLICATIONS

19. We are concerned by the way in which a bill with constitutional implications has been handled.¹⁵ The consultative process was lamentable: for example, the consultation document on reform of the Regulatory Reform Act 2001¹⁶ did not capture the full extent of the Government's proposals as they emerged in the original version of the bill. It is unfortunate, too, that the opportunity was not taken to give pre-legislative scrutiny to the bill, in sharp contrast to the approach taken in 2000 to the Regulatory Reform Bill, where pre-legislative scrutiny was commended as “a model of this process”.¹⁷ It is equally unfortunate that the committee stage of the bill was not taken on the

¹³ The Regulatory State: Ensuring its Accountability, 6th Report, 2003–04, HL Paper 150.

¹⁴ In practice, the term “Regulations” tends to be used for sets of rules of wide general application and “Rules” for procedural matters; there is a wider range of uses for “Orders”.

¹⁵ For our report on this generally, see Constitution Committee *Changing the Constitution: The Process of Constitutional Change*, 4th Report, 2001–02, HL Paper 69.

¹⁶ Cabinet Office (Better Regulation Executive) *A Bill for Better Regulation: Consultation Document* (July 2005).

¹⁷ Delegated Powers and Regulatory Reform Committee, 2nd Report, 2000–2001, HL Paper 8, para.7.

floor of the House of Commons, despite requests to do so from a select committee, and contrary to long accepted practice in relation to bills of first class constitutional importance.¹⁸ There is also cause for some concern at an apparent lack of cross-departmental coordination: earlier in the current parliamentary session the Company Law Reform Bill, sponsored by the DTI, was introduced containing provision (in part 31) for similar ministerial powers to change the statute book in relation to company law, without apparently fully appreciating that this would have been rendered largely redundant by the passing of the Legislative and Regulatory Reform Bill (sponsored by the Cabinet Office) in the form the Government wished.¹⁹

20. Although the Government's concessions are to be welcomed, the fact that they were made during the final stages of the bill's passage through the House of Commons is something of an indictment of the processes of policy-making and legislation. As the Hansard Society recommended in 1992, "getting a bill right should always have priority over passing it quickly...the Government should make every effort to get bills in a form fit for enactment, without major alteration, before they are presented to Parliament".²⁰ We acknowledge that the Government has adopted an open approach to listening to critics of the bill and has brought forward several new clauses, but this is no substitute for well-planned legislation.
21. We note that by the time of the bill's report stage in the House of Commons the Government publicly recognised its profound constitutional importance. But the fact that, as we presume to be the case, this was not foreseen before it was introduced to the House of Commons (or, indeed, the Company Law Reform Bill introduced in this House) is a striking indictment of the lack of consideration given by Government to the constitutional implications of proposed legislation. It also discourages confidence that use by Ministers of the proposed delegated powers to change the statute book will not bring about—deliberately or inadvertently—constitutional change that ought to be made by primary legislation.
22. In response to widespread concern, the Government has sought to rely on ministerial assurances as to how the widely drafted power in the bill—now removed—would be exercised. For example, at the bill's second reading in the House of Commons, the then Parliamentary Under-Secretary of State for the Cabinet Office (Mr Jim Murphy)²¹ said "I am giving a clear undertaking today that orders will not be used to implement highly controversial reforms, that they will not be forced through in the face of opposition of Committees of this House and that Committees' views on what is appropriate for delivery by order will be final".²²

¹⁸ For a recent survey of the practice see R Hazell "Time for a New Convention: Parliamentary Scrutiny of Constitutional Bills 1997–2005" [2006] *Public Law* 247.

¹⁹ In our *Third Progress Report* (9th Report, Session 2005–06, HL Paper151, paragraphs 6 and 7) we endorsed the conclusion of the Select Committee on Delegated Powers and Regulatory Reform that the proposed power in the Company Law Reform Bill was inappropriate and should be removed from the bill, which it was.

²⁰ *Making the Law: the Report of the Hansard Society Commission on the Legislative Process* (Hansard Society for Parliamentary Government, London, 1992) p 139.

²¹ In the recent Cabinet reshuffle Mr Murphy moved from the Cabinet Office to become Minister for Employment and Welfare Reform. The new Parliamentary Secretary for the Cabinet Office is Mr Pat McFadden MP.

²² HC Hansard, 9 February 2006, cols 1058–59; the Minister went on to clarify that he also meant to refer to committees of the House of Lords.

23. **Constitutional safeguards cannot depend on ministerial assurances. Although no doubt sincerely made, ministerial pledges may not be regarded as binding by future governments and are liable to be eroded by exceptions. Moreover, such assurances may not be in the mind of future Ministers, legislators and officials. The rule of law and the principle of constitutional government require the security of procedures and limitations which are set out expressly on the face of any enactment which empowers Ministers to change the statute book by order. The legitimate desire of any Government to deliver change should not be allowed to undermine the need for careful consultation and scrutiny of proposals that may have the effect of altering basic constitutional machinery.**

THE PROBLEMS OF LEGISLATIVE CAPACITY

24. The other main constitutional questions raised by the bill relate to the appropriateness of Parliament delegating law-making and law-changing powers to Ministers. The bill raises in a stark way a conflict between two legitimate goals of a constitutional system: on the one hand the need to provide mechanisms for effective law-making and reform; and on the other the constitutional imperative of ensuring that legislative proposals are adequately scrutinised and controlled by Parliament. The question for the House is whether the bill strikes a satisfactory balance between these two goals.
25. The procedure for making Acts of Parliament is the proper basic standard within our parliamentary law-making system. It enables consideration of bills by both Houses consecutively, separate debates on the principles of the legislation and detailed line-by-line scrutiny of the clauses of the bill, and opportunities to move amendments. A range of select committees have opportunities to review bills against various criteria, including whether bills “inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate level of parliamentary scrutiny”,²³ “the constitutional implications” of bills,²⁴ and their compliance with human rights law.²⁵ The bill procedure is valued not only because of its potential to improve legislative proposals but also because it embodies the principles of parliamentary democracy. In our system, elected representatives can engage directly in the legislative process in the House of Commons through considered debate; and the revising function of the House of Lords (including the work of our own Committee) ensures that the constitutional principles which underpin democracy are not inadvertently or lightly eroded by the Government’s legislative proposals.
26. This detailed scrutiny of bills does, however, have the practical consequence that, on average, fewer than 38 a year complete their passage through Parliament and receive Royal Assent.²⁶ We recognise that the pressures on the parliamentary timetable result in some worthwhile legislative proposals—including those made by the Law Commissions—failing to find time for

²³ The terms of reference of the House of Lords Delegated Powers and Regulatory Reform Committee.

²⁴ Our own terms of reference.

²⁵ Joint Committee on Human Rights.

²⁶ The number of Acts receiving Royal Assent in recent years are: 2005 (24); 2004 (38); 2003 (45); 2002 (44); 2001 (25); 2000 (35); 1999 (35); 1998 (49); 1997 (69).

consideration because the Government chooses not to make them a political priority (though, as we have noted in a previous report, there are some who believe that there is too much legislation).²⁷

27. **Nonetheless, we believe that the bill procedure remains the most effective and appropriate way for Parliament to scrutinise and give consent to major changes in the law, especially where issues of principle and important policy are in issue. Separate consideration of bills by each House consecutively, the engagement of several select committees, and the ability of Members of each House to move amendments to bills provide essential constitutional safeguards against ill-thought through proposals.**
28. The Legislative and Regulatory Reform Bill seeks to increase capacity to change the statute book by delegating powers to do so to Ministers. Such delegation is not, however, the only way of increasing legislative capacity. The bill's goals, especially those related to implementation of Law Commission recommendations, need to be set in the context of parliamentary reform more generally. Bill procedures have been subject to modification in recent years, partly to increase capacity but also with the aim of improving the quality and proportionality of scrutiny.²⁸ Among the changes are: that bills may now be carried over from one parliamentary session to another; publication of bills in draft can assist in the process of effective law-making;²⁹ in the House of Commons attention has also been given to the better programming of bills;³⁰ House of Commons Standing Order 59 makes special provision for Law Commission bills to be referred to a second reading committee; in this House, Grand Committees are used for the committee stage of some bills;³¹ consolidation bills are subject to a special procedure (whereby, after second reading in this House the bill is committed to a joint select committee of both Houses); a Special Public Bill Committee exists in this House to examine non-controversial but technical Bills (the Jellicoe procedure), though it is little used and doubts have arisen about its efficacy; and the Joint Committee on Tax Law Rewrite Bills provides another example of procedural innovation.
29. **The difficulties of lack of parliamentary time for legislative proposals are systemic. Delegation of powers to Ministers to change the statute book is certainly not the only or necessarily a desirable solution to the problem.**

DELEGATION OF LAW-MAKING POWERS TO MINISTERS

30. The compromise that has been reached in the United Kingdom between effective legislative processes and parliamentary scrutiny is for Parliament to

²⁷ Constitution Committee, 14th Report, *Parliament and the Legislative Process* HL 173, 2003–2004, para 222.

²⁸ The House of Commons Select Committee on Modernisation of the House of Commons has recently carried out a consultation on the committee stage: First Special Report, HC 810, 2005–06.

²⁹ House of Commons Select Committee on Modernisation of the House of Commons, *Modernisation of the House of Commons: A Reform Programme*, HC 1168-I, 2001–02.

³⁰ House of Commons Select Committee on Modernisation of the House of Commons, *Modernisation of the House of Commons: Programming of Bills*, HC 1222, 2002–03; House of Commons Procedure Committee, 4th Report, *Programming of Legislation*, HC 325, 2003–04. The effectiveness of programming requires the Government to refrain from introducing numerous amendments or new clauses at a late stage of a bill's consideration.

³¹ House of Lords Procedure Committee, 3rd Report, HL 184, 2003–2004.

delegate some law-making powers to Ministers. In legal systems with different understandings from our own of the principle of separation of powers (such as the USA, Ireland and South Africa), such delegation is regarded as anathema and is constitutionally prohibited. Australia, Canada and India join the United Kingdom in permitting such delegation. So for many years it has been commonplace for Acts of Parliament to delegate powers to Ministers to make legislation in the form of orders (statutory instruments) to make detailed rules governing statutory schemes. More than 3,400 orders were made in 2004 alone.

31. Compared to the bill procedure, parliamentary procedures for scrutinising delegated legislation are less rigorous. The Joint Committee on Statutory Instruments considers whether a draft order needs to be drawn to the attention of Parliament as exceeding the limits of the authority delegated to the Minister. In this House, since December 2003, the Committee on the Merits of Statutory Instruments considers whether the policy implications of a draft order are such that it ought to be drawn to the attention of the House. Debates on orders are now rare. In the House of Commons, such debates are normally conducted in a standing committee. Debating time is limited to 90 minutes. No amendments can be moved. It is also of note that the text of delegated legislation is normally drafted by departmental lawyers rather than Parliamentary Counsel (who are responsible for bills).
32. Most legislative powers delegated to Ministers by Parliament are for the purpose of setting out in more detail the practical means to implement the policy enacted by the enabling Act of Parliament. But Ministers may also be conferred with “Henry VIII” powers to make orders that change the statute book.³² There are several good reasons for special caution about such powers. One is that they risk undermining the legislative supremacy of Parliament, a central principle of the United Kingdom’s constitution, an aspect of which is that “no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament”.³³ Another is that parliamentary scrutiny of ministerial orders is less rigorous than scrutiny meted out to legislative proposals that are contained in bills, yet in this case the Minister will be amending or repealing primary legislation.
33. A third and often overlooked reason for caution is that they make the statute book complex and uncertain. When a Minister exercises a Henry VIII power to amend a provision in an Act of Parliament, the order by which that is done is delegated legislation and the amended provision in the Act of Parliament retains the character of delegated legislation. The Parliamentary Roll conclusively states what is and is not an Act of Parliament (subject to the principle of implied repeal). The fact that the Controller of HMSO, or a commercial publisher, may print an Act of Parliament with amendments to it made by order cannot, in and of itself, make those amendments part of the Act of Parliament. The fact that the order itself calls the amended provision part of an Act of Parliament cannot be conclusive of that status. The amended provision retains its status as delegated legislation. It would be open to a claimant to challenge the validity of an amended provision in judicial review proceedings on all the grounds available for challenging

³² The Delegated Powers and Regulatory Reform Committee have played an important role in supervising the inclusion of such powers in bills.

³³ A V Dicey *An Introduction to the Study of the Constitution*

delegated legislation (illegality, irrationality and procedural impropriety). The constitutional principle of legislative supremacy of Acts of Parliament would not be an impediment to such a challenge.

34. The delegation to Ministers by Parliament of powers to change the statute book has nonetheless become a well-established feature of the law-making process in this country. Their routine use does not, however, diminish the constitutional oddity of allowing the executive branch of government to set aside or amend primary legislation previously consented to by Parliament. The practical necessity for such an arrangement must be matched by clearly limited powers, to be exercised for specific purposes, and to be subject to adequate parliamentary oversight (including a veto) to guard against inappropriate use of such powers.
35. The *general* acceptability of delegating powers to Ministers to change the statute book is now accepted within the United Kingdom's constitutional system. The question in relation to the bill is therefore whether Ministers should have power to change the statute book for the *specific purposes* provided for in the bill and, if so, whether there are adequate procedural safeguards to ensure that Parliament has effective oversight and control over Ministers' legislative powers. The Government's original proposals for a power to be used for "reforming legislation" clearly failed this test. The bill as introduced to the House of Lords confers powers for three specific purposes—two relating to better regulation and a third to implementation of Law Commission proposals.

Henry VIII powers for purposes of better regulation

36. In two previous Acts,³⁴ Parliament has delegated powers to Ministers to change Acts of Parliament for the purposes of deregulation or better regulation. A general precedent has therefore been set. **We recognise that amendments made to the bill in the House of Commons have resulted in the definition of Ministers' powers being better aligned to the overall regulatory purposes of the bill but we believe that the scope of the power could be defined more narrowly.** Clause 1(2) which permits orders to remove burdens (of any kind) necessarily involves the power to impose similar burdens upon others (as is recognised by Clause 3(2)(c)), or to abolish or reduce obligations designed for the protection of others. This has, hitherto, been the province of law-making by bills which are subject to full parliamentary scrutiny.
37. **We believe that additional procedural safeguards could be introduced which would strike a better balance between the Government's goal of facilitating better regulation (on which there is considerable cross-party support) and the constitutional imperative of effective legislative scrutiny.** We discuss these below, after examining the powers the bill proposes to delegate to Ministers in relation to recommendations of the Law Commissions.

³⁴ Deregulation and Contracting Out Act 1994; Regulatory Reform Act 2001.

Henry VIII powers for implementing Law Commission recommendations

38. Clause 3 of the bill confers on Ministers powers to change the statute book and also rules of common law for the purpose of “the implementation of recommendations of any one or more of the United Kingdom Law Commissions, with or without changes”.
39. In exercising this power, a Minister may make: provision amending or abolishing any rule of law; provision codifying rules of law; provision conferring functions on any person (including functions of legislating or functions relating to the charging of fees); provisions modifying the functions conferred on any person by any enactment; provision transferring, or providing for the transfer or delegation of, the functions conferred on any person by any enactment; and provision abolishing a body or office established by or under an enactment, and a general provision to amend or repeal any enactment (clause 3(4)).
40. There are three particularly notable features of the order-making power in relation to Law Commission proposals. First, the power extends beyond changing the statute book to amending, abolishing and codifying common law rules. This is a highly unusual—perhaps unprecedented—use of delegated law-making powers. Secondly, Ministers have power to make orders implementing Law Commission recommendations “with or without change”. The rationale is partly that the passage of time and other changes to the law may require this; but the Government may simply disagree with an aspect of the Law Commission recommendation and choose not to proceed with that. Thirdly, much of the Law Commissions’ work deals with questions of broad policy and matters of principle. The Law Commissions have, for example, considered the law relating to judicial review, aspects of family law and also crime (including the codification of English criminal law). Matters of principle have hitherto been regarded as more appropriate for bills than delegated legislation. Ministers have given undertakings that the order making powers under Part 1 of the bill will not be used for controversial matters,³⁵ but as we have already stated, ministerial assurances can be no substitute for clearly defined limits to ministerial power.
41. There are separate Law Commissions in each of the United Kingdom’s three legal jurisdictions. The Law Commission of England and Wales was established by statute in 1965. Led by five Law Commissioners (drawn from the judiciary, practising lawyers and academics), the Commission explains its role in the following terms: “Our methods concentrate on systematic law reform: careful selection of projects, following consultation; close study; comparison with the law in other countries; thorough consultation; and a final report which usually incorporates a draft Bill”.³⁶ The Law Commissions in Scotland and Northern Ireland have similar remits. In those jurisdictions, many of the recommendations made by the Law Commissions fall within the legislative competence of the Scottish Parliament and Northern Ireland Assembly. In this report we therefore focus on the position of the Law Commission of England and Wales.

³⁵ HC Hansard, 15 May 2006, col 789.

³⁶ Annual Report 2003–04 (LC 288), para 2.1.

42. After the Law Commission has completed a law reform project (agreed in advance with the Department for Constitutional Affairs), a formal report is made. Recommendations contained in a Law Commission report may be implemented in various ways, depending on the nature of the law and the proposed reform: by enactment in primary legislation; through delegated legislation including Regulatory Reform Orders; or through judicial decision-making.³⁷ Where legislation is required—whether primary or delegated—progress in implementation will only be made insofar as the Government of the day agrees with the proposal, it is a departmental priority, and time can be found in the parliamentary timetable for a bill or delegated legislation.
43. The Quinquennial Review of the Law Commission in 2003 examined the implementation of Law Commission recommendations (and we set out extracts from that report in Appendix 3). At second reading of the bill in the House of Commons, the then Parliamentary Under-Secretary of State for the Cabinet Office (Mr Jim Murphy MP) said “I believe that 29 of the Law Commission’s proposals have not yet been implemented and that the Government consider about 16 of them to be non-contentious”.³⁸
44. **We recognise the problem of non-implementation of Law Commission recommendations. We are, however, troubled about the breadth of the power enabling orders to be made under Part 1 of the bill in this context, the lack of clear limits on the changes that the Government may make to Law Commission recommendations and the absence of any firm legal constraint on using Part 1 powers to implement controversial proposals. The Quinquennial Review of the Law Commission of England and Wales emphasised the need for a range of new procedural devices to facilitate implementation of recommendations. We are unconvinced that delegating order-making powers to Ministers to change the statute book and the common law is the most constitutionally appropriate way forward; certainly it is not the only one. The Government needs to explain carefully to the House why the existing procedures for expediting Law Commission bills is not more widely used and how that procedure might be improved.**

DESIRABILITY OF FURTHER SAFEGUARDS

45. During the passage of the bill since its introduction to the House of Commons in January a range of options has been advocated as to how the bill might better constrain ministerial powers. **Our view is that additional safeguards can be introduced to protect matters of constitutional importance without undermining the policy goals of the bill. It will be for the House as a whole to determine how best to strike the balance between facilitating ministerial initiatives for regulatory reform and incorporating constitutional safeguards.**

Strengthen parliamentary procedures

46. As with other types of delegated legislation, both Houses of Parliament have power to vote against a draft order to prevent it being made. This happens at the final stages of the negative, affirmative or super-affirmative procedures. In practice, however, it is unusual for parliamentary time to be found in the

³⁷ Quinquennial Review of the Law Commission by John Halliday CB (March 2003) , para.7.1.

³⁸ col 1054.

House of Commons to debate “prayers” brought by backbench Members against orders made by the negative resolution procedures. Even motions put down by the Official Opposition are not guaranteed time. In the House of Lords it is unusual for motions on delegated legislation to be put to the vote. For all these reasons, parliamentary votes in the final stages of a draft order’s passage through Parliament provide only limited safeguards against bad or inappropriate legislation being made.

47. The Government has therefore accepted that it is appropriate for the bill to include an express provision that allows Parliament to express a view at an early stage of the procedure that a draft order should not proceed as delegated legislation—a safeguard recommended by the House of Commons Procedure Committee.³⁹ As we have noted, the bill as introduced to the House of Lords provides designated committees of both Houses of Parliament with express statutory power to recommend to their respective Houses that a draft order not proceed. A Minister would then have to abandon plans to legislate by order and proceed by way of a bill (or not at all). That veto is however qualified. The committees are circumscribed in the factors that they may take into account in making a recommendation. Committee recommendations are not binding on the respective Houses and may be overturned by resolution, leaving Ministers free to proceed.
48. There are several ways in which the parliamentary procedures might be strengthened. One would be to remove the restriction on the factors that the designated select committees may take into account in deciding whether to recommend a procedural veto (clauses 17(5), 18(4), 19(6)) or to give the committees power to impose a veto where they considered that the subject matter was too important or too controversial to be dealt with other than by primary legislation. This would enable the committees to consider whether in their judgement a proposal was simply too controversial to proceed by order.
49. Secondly, each House could be given an earlier opportunity to veto a Government proposal to legislate by order. As the bill stands, the first opportunity each House as a whole has to express a view on the inappropriateness of using the order-making procedure for a particular proposal (rather than a bill) is if a House decides to reject the view of its select committee that no further proceedings be taken in relation to a draft order—but the select committee may not make such a recommendation until the expiry of a 30-day period. There may be occasions on which a ministerial proposal for a draft order arouses so much controversy that the House may wish to say “no” to the procedure without delay. If a House may resolve within the 30-day period that the order-making procedure *shall* apply (clause 16(6)), it is difficult to see why the House should be restrained from expressing a contrary view in that time.
50. Thirdly, the mechanism in the bill for “upgrading” the order-making procedure (clause 16(3)-(4)), to require a higher degree of parliamentary scrutiny, could be operated by the designated select committee in either House rather than by the House as a whole.⁴⁰ Indeed, allocating

³⁹ First Report from the Procedure Committee, Session 2005–06, Legislative and Regulatory Reform Bill, HC 894, para 52.

⁴⁰ To require an order recommended by the Minister to follow the negative resolution procedure to be dealt with under affirmative or super affirmative procedures; or an affirmative to super affirmative resolution procedure.

responsibility to committees—rather than insisting on resolutions from either House—might be thought to fit well with the avowed aim of the bill to have parliamentary procedures that are proportionate to the issues at stake.

51. A fourth way in which parliamentary procedures could be strengthened is in the final stages of consideration of draft orders. This House could revise its practice of not normally voting on prayers against draft orders.⁴¹ Where a draft order seeks to change the statute book it may be thought appropriate for the House to express its consent or otherwise in a division. (This would be a matter for this House rather than a change requiring an amendment to the bill, but if Government recognised the desirability of this proposal, some concerns might be allayed). The control of the two Houses over orders made by the negative resolution procedure could be further enhanced by providing for prayers against draft orders to have a suspensory effect, so that a Minister could not make an order until after a debate and vote on the draft order.

Prohibit orders from changing constitutional fundamentals

52. From the outset, concerns have been expressed that orders made under Part 1 of the bill might enable important constitutional arrangements to be altered, deliberately or inadvertently. The new clauses, focused on regulation, reduce the opportunities for this to happen, though the powers related to Law Commission recommendations remain sufficiently wide to enable constitutional change. As we have noted, ministerial undertakings are no substitute for express legislative clarity.
53. There are two possible methods of excluding basic constitutional matters from the scope of the bill. One is to list enactments of a constitutional nature in respect of which ministerial orders may not be made. Such a list might include the following:
- Magna Carta 1297
 - Bill of Rights 1688
 - Crown and Parliament Recognition Act 1689
 - Act of Settlement 1700
 - Union with Scotland Act 1707
 - Union with Ireland Act 1800
 - Parliament Acts 1911–49
 - Life Peerages Act 1958
 - Emergency Powers Act 1964
 - European Communities Act 1972
 - House of Commons Disqualification Act 1975
 - Ministerial and Other Salaries Act 1975
 - British Nationality Act 1981
 - Supreme Court Act 1981

⁴¹ Rare examples of successful motions to annul are in 2000 (Greater London Authority Elections Rules (SI 2000/208) and in 1979 (the Paraffin (Maximum Retail Prices) (Revocation) Order 1979 (SI 1979/797)).

- Representation of the People Act 1983
 - Government of Wales Act 1998
 - Northern Ireland Act 1998
 - Scotland Act 1998
 - House of Lords Act 1999.
54. Since that list was drawn up—by the Joint Committee on the draft Civil Contingencies Bill, as legislation in respect of which powers to modify or disapply legislation under the terms of that bill should not apply⁴²—further legislation of a constitutional nature has been enacted. One may therefore add:
- Constitutional Reform Act 2005
 - Equality Act 2006
 - Identity Cards Act 2006
 - Racial and Religious Hatred Act 2006
55. There are a number of practical difficulties with this approach of simply listing Acts of Parliament. It may not be possible to agree on whether a particular Act is “constitutional”. It is also something of a blunderbuss approach: there are provisions in some of these Acts which are not “constitutional” and it might be thought wrong to exclude such provisions from the general operation of the bill.
56. An alternative method of seeking to protect basic constitutional arrangements from amendment or abolition by order would be not to set out a list of statutory provisions but to enumerate those constitutional arrangements. A list of such arrangements might include:⁴³
- the powers of and succession to the Crown;
 - the powers and composition of either House of Parliament;
 - the basis of election or appointment of Members of either House of Parliament;
 - the duration of Parliaments;
 - the appointment, powers, duties and obligations of judges or magistrates of any court;
 - the devolution settlements in Northern Ireland, Scotland and Wales;
 - the establishment or disestablishment of any church or religion;
 - the arrangements for local government;
 - the fundamental rights and freedoms of those living in the United Kingdom, including rights under the European Convention on Human Rights, the right to jury trial, the right not to be detained without charge,

⁴² HL Paper 184/HC 1074, Session 2002–03. The list also included the Human Rights Act 1998, but in relation to the bill the Government has accepted an amendment that prevents Part 1 orders making changes to that Act.

⁴³ Proposed by the Liberal Democrat MP Mr David Howarth.

rights concerning nationality or immigration status and the conditions under which any person may be extradited from the United Kingdom;

- the law relating to freedom of information, data protection, the regulation of investigatory powers, the powers and organisation of the police and the powers and organisation of the security services.

57. In our uncodified constitution, identifying constitutional legislation and constitutional arrangements is not entirely straightforward. **Far from detracting from the point of principle that a ministerial order is not an appropriate method of bringing about constitutional reform, this reinforces the case for the committees to have a veto on orders of major importance.**

Enhance protection of Human Rights

58. The Joint Committee on Human Rights made a report on the bill before the far-reaching amendments were moved in the final stages of the bill's passage through the House of Commons.⁴⁴ The JCHR called for the Human Rights Act 1998 to be made exempt from change by order under Part 1 of the bill and the Government has accepted an amendment to this effect (clause 9(b)). The JCHR also called for the bill to be amended to make clear that orders made under Part 1 are not "primary legislation" for the purposes of the Human Rights Act. Such an amendment would permit the courts to make quashing orders in respect of any Part 1 order found to be incompatible with Convention rights, rather than merely making a declaration of incompatibility under section 4 of the 1998 Act. **We concur with the view of the JCHR.**
59. The bill places no express duty on Ministers to explain to Parliament why they consider draft orders to be compatible with Convention rights or to make declarations of compatibility as they are required to do in relation to bills under section 19 of the Human Rights Act. In Part 1 of the bill Parliament is delegating its authority to change the statute book. **We see considerable merit in requiring Ministers to treat draft orders in similar ways to bills in relation to explaining and certifying compliance with Convention rights.**

Define ministerial power more objectively

60. Clause 4(1) of the bill provides for preconditions to the exercise of order-making power under Part 1. A Minister cannot make a draft order unless he considers that these conditions are satisfied. A greater degree of objectivity could be created if this provision was amended to provide that a draft order cannot be made unless the Minister "reasonably considers" the conditions are satisfied.

Restrict sub-delegation of legislative powers

61. Clause 3(4)(c) of the bill expressly provides that an order changing the statute book may confer "functions on any person (including functions of legislating...)". This sub-delegation may be thought to be inappropriate for two reasons. First, the legislation to be carried out by "any person" is subject

⁴⁴ Seventeenth Report from the Joint Committee on Human Rights, Session 2005–06, Legislative Scrutiny: Eighth Progress Report, HC 1062.

to no parliamentary oversight, for example that the legislation must be in the form of a statutory instrument laid before Parliament. Secondly, and more fundamentally, constitutional concerns arise about the very fact of sub-delegation. The legal maxim *delegatus non potest delegare* (a delegate cannot delegate) captures an important general principle. The Government has indicated that it will reconsider the scope of this clause and return to the issue when the bill makes progress in the House of Lords.⁴⁵

Impose constraints of time

62. The order making powers currently in force under the Regulatory Reform Act 2001 cannot be exercised in relation to statutory provisions that are less than two years old. It may be argued that such a “buffer zone” protects the will of Parliament as expressed in statutory words from too hasty amendment or repeal by order.

CONCLUDING REMARKS

64. The manner in which the bill has been handled provides a stark illustration of how, in our unwritten constitution, legislative proposals may—deliberately or inadvertently—affect the basic architecture of our law-making system and the relationship between Parliament and Ministers. Equally, parliamentary scrutiny of the bill demonstrates the value of the bill procedure in identifying and correcting inappropriate Government proposals.
65. Delegation of power to Ministers to change the statute book is now an established feature of our constitutional system—but it is acceptable only insofar as those powers are appropriately circumscribed by law (ministerial assurances are insufficient) and parliamentary procedures permit adequate scrutiny and control over draft orders. In both these respects, the bill as introduced to this House provides stronger safeguards than were contained in the Government’s initial proposals. For the reasons set out in this report we are however not yet convinced that the bill strikes the right balance between on the one hand facilitating useful legislative changes and, on the other, enabling effective parliamentary scrutiny and control of draft orders and protection of constitutional fundamentals from deliberate or inadvertent change.

⁴⁵ HC Hansard, 16 May 2006, col 938.

APPENDIX 1: CORRESPONDENCE WITH THE GOVERNMENT

Letter from the Chairman to the Lord Chancellor, 23 January 2006

The Committee, which I chair, has noted with interest the publication of the Legislative and Regulatory Reform Bill. Whilst, in due course when it comes before the House of Lords, we shall of course carry out in-depth scrutiny of its provisions, on a preliminary reading the bill appears to be of first class constitutional significance. The Committee has therefore asked me to write to you, in your capacity as the Government's guardian of the constitution, to outline the nature of the concerns raised by the proposed legislation, and to do so before second reading in the Commons.

As you know, the Committee eschews comment on the policy underlying measures it scrutinises. We will not therefore seek to question the objective, as explained in the Cabinet Office's press release, to tidy up and improve the processes involved in regulation and reduce red tape. But we are concerned by the potential of the Bill's proposals, if enacted, markedly to alter the respective and long-established roles of Ministers and Parliament in the legislative process. This is because Part 1 of the Bill seeks to confer unprecedentedly wide powers on Ministers to make Orders to amend, repeal and replace any legislation (and to grant powers in respect of rules of the common law in relation to Law Commission recommendations), with only a very restricted role for Parliament in the process. The reforms thus have the potential to be so far reaching that especial consideration will need to be given by the Committee to the risk of inadvertent and ill considered constitutional change.

May I add that it is disappointing that the Bill was not first published in draft, as this is the sort of constitutional reform measure that would benefit greatly from effective pre-legislative scrutiny?

I am sending a copy of this letter to Jim Murphy MP at the Cabinet Office.

Reply from the Lord Chancellor to the Chairman, 8 February 2006

I am replying to your letter of 23 January on the Legislative and Regulatory Reform Bill. I am grateful for an early indication of the Committee's thinking on the Bill and for the opportunity to comment on it.

Your letter expresses concern about what the Committee sees as the unprecedentedly wide order making powers that would be available to Ministers to seek amendments to primary legislation and, in the case of orders implementing Law Commission recommendations, the common law. The Committee considers that these proposals would alter the respective and long-established roles of the Ministers and Parliament in the legislative process. You describe the role of Parliament in the process of scrutiny of the orders envisaged in the Bill as "very restricted".

I accept that the power to make orders in the Bill is wide ranging. However, in developing the proposals set out in the Bill the Government has been mindful at all times of the need to balance the objectives of the Bill with the need for sensitivity in managing the relationship between the executive and the legislature. It might therefore be of assistance to the Committee if I set out some of the thinking behind the Bill.

The Bill replaces the Regulatory Reform Act 2001, in which I have a special interest, as I was the Minister responsible for its passage through the House of

Lords. The 2001 Act itself succeeded the Deregulation and Contracting Out Act 1994. Both Acts were intended to remove onerous restrictions upon business by the appropriate use of Henry VIII powers. The 2001 Act extended these powers so that they could reform entire regimes and remove restrictions from the public sector as well as business.

During the passage of the 2001 Act through Parliament, the Government undertook to review its operation. This review took place last year. We found that the powers and procedures available under the 2001 Act had not enabled us to meet its objectives. This conclusion was reached after careful consideration and was supported by consultation on proposals for reforming the 2001 Act. The Bill currently before Parliament therefore develops the powers in the 2001 Act in order to allow Government and Parliament to support business and the public and voluntary sectors in their work by providing improved means to deliver the Government's Better Regulation objectives. Similarly, the proposal in the Bill to give effect to Law Commission recommendations will enable the Government and Parliament to deliver worthwhile and carefully considered law reform in a timely fashion. This is something that has not proved possible under the 2001 Act, despite the expectations of Ministers and the scrutiny committees.

In bringing this package of reforms before Parliament the Government shares the Committee's sensitivity to ensuring that any power to amend primary legislation via orders is used proportionately and that the possibility of abuse is minimised. The Government considers that its proposals balance the need for effective delivery with effective safeguards to guarantee appropriate levels of scrutiny. The Procedures in the Bill are designed to ensure a level of scrutiny proportionate to the size, complexity and relative level of controversy of each proposed order and to determine this on a case by case basis. Furthermore, Parliament has the final say in what degree of scrutiny is appropriate and could, for example, require that all Orders be made superaffirmative. The onus is therefore on the Government to justify why less onerous scrutiny is appropriate.

The Government has already made clear its intention that it will not use the powers in the Bill to implement highly controversial proposals or to press on with proposals to which the committees object.

Taking these provisions with the preconditions on the exercise of the powers, the obligation to consult on proposals to make an order and to lay draft orders and explanations before both Houses, I am confident that the Bill will provide sufficient guarantees that the powers are used appropriately.

I note your disappointment that the Bill was not subject to pre-legislative scrutiny. I share your view of the value of this process. Equally there are difficult decisions to be taken on which Bills can be made available for pre-legislative scrutiny, bearing in mind the Government's and Parliament's priorities. In this case the proposal for a Bill was the subject of public consultation last summer. One feature of the responses to that consultation was that the need to deliver the Better Regulation agenda was urgent. The Government therefore concluded that it should bring forward its proposals for legislation to enable the delivery of that agenda as soon as possible.

As ever, the Government will of course pay close attention to the views of individual Parliamentarians and Committees of both Houses as the Bill progresses through Parliament. We have already received the report of the Regulatory Reform Committee and are considering it carefully. The Government therefore looks forward to engaging with the Committee on the Bill.

I am copying this letter to Jim Murphy.

Letter from Jim Murphy, MP to Andrew Miller, MP, 12 April 2006

As you know, the Legislative and Regulatory Reform Bill has potential to make a real impact on reducing burdensome regulation. This Bill is the third attempt by a government since 1994 to have an Act that can improve the way we regulate for the public sector, businesses, charities and the voluntary sector. We must get this third attempt right if we are not to put our shared ambitions on the better regulation agenda at risk.

As I've mentioned before, the Regulatory Reform Committee and its equivalent in the Lords have played an important role in constructively scrutinising the proposals in the Bill. And I would like to thank you for the important contribution you made during the Bill's committee stage.

The Bill's passage so far has served to confirm the general consensus that the 2001 Act is not up to the job of delivering the action on red tape that businesses, public servants and voluntary workers tell me they need. That's because the 2001 Act is too narrowly defined and too complicated to use. The new Legislative and Regulatory Reform Bill aims to deal with these shortcomings.

However in its current form, the Bill has caused some people to voice concern about the order making power of the Bill. Some of the wilder concerns have ranged from government being able to use the power to abolish trial by jury to repealing the Magna Carta. These and other farfetched concerns about our constitutional arrangements could never happen as a result of this Bill. Similar wild accusations were made in 1994 and 2001 and proved to be groundless.

However, I have listened to more measured concerns about using the power for changes to legislation that deliver no better regulation benefit. Again I must stress that this Bill is to deliver our better regulation agenda and nothing else.

I am writing to you today to confirm my intention to move this debate on to the real agenda of better regulation and to remove any cause for concern that the Legislative and Regulatory Reform Bill could ever be used for anything other than achieving our better regulation objectives.

Let me be quite clear, safeguards already in the Bill ensure that the order-making power cannot be used to remove necessary protections, rights or freedoms. And I have already made a commitment to give Parliament a statutory veto on the face of the Bill. In addition, I am now looking into making the power more clearly focused on delivering better regulation objectives. But I am determined that the power is framed in such a way that we still are able to deliver real change, including the initiatives that departments will be proposing in their forthcoming simplification plans and the benefits of our ambitious admin burdens reduction programme. There is real determination in Government to deliver on these commitments.

The types of initiative we would want to use the Bill for include the simplification and consolidation of legislation so it is easier for business, the public and voluntary sectors to work with; ensuring that inspection is risk-based to reduce regulatory burdens; the streamlining of consent regimes to make them more transparent; the reduction of administrative burdens and the exemption in certain key instances of SMEs, charities and others from burdensome regulation.

I hope to bring forward appropriate amendments by Commons Report Stage to achieve these aims.

All those who want to see real action taken to lighten the regulatory load on business, our public services and the voluntary sector will be reassured by focussing the order making power on better regulation objectives. There will now be a clear expectation from businesses, the public sector and voluntary workers that this Bill receives broad support.

APPENDIX 2: COMPARISON OF 2001 ACT AND HL BILL 109

| | Regulatory Reform Act 2001 | HL Bill 109 (excluding provision relating to Law Commission recommendations) |
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| Purpose for which Henry VIII power may be exercised | <p>Section 1(1)</p> <p>“...a Minister of the Crown may by order make provision for the purpose of reforming legislation which has the effect of imposing burdens affecting persons in the carrying on of any activity, with a view to one or more of the following objects --</p> <ul style="list-style-type: none"> (a) the removal or reduction of any of those burdens, (b) the re-enacting of provision having the effect of imposing any of those burdens, in cases where the burden is proportionate to the benefit which is expected to result from the re-enactment, (c) the making of new provision having the effect of imposing a burden which- <ul style="list-style-type: none"> (i) affects any person in the carrying on of the activity, but (ii) is proportionate to the benefit which is expected to result from its creation, and (d) the removal of inconsistencies and anomalies.” | <p>Clause 1(2) [Power to remove or reduce burdens]:</p> <p>“removing or reducing any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation.”</p> <p>Clause 2(2) – (3) [Power to promote regulatory principles]:</p> <p>“securing that regulatory functions are exercised so as to comply with the principles” that (a) they “should be carried out in a way which is transparent, accountable, proportionate and consistent”; (b) “regulatory activities should be targeted only at cases in which action is needed.”</p> |

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| <p>Definition of “burden”</p> | <p>Section 2(1):</p> <p>“In this Act ‘burden’ includes includes --</p> <p>(a) a restriction, requirement or condition (including one requiring the payment of fees or preventing the incurring of expenditure) or any sanction (whether criminal or otherwise) for failure to observe a restriction or to comply with a requirement or condition, and</p> <p>(b) any limit on the statutory powers of any person (including a limit preventing the charging of fees or the incurring of expenditure),</p> <p>but does not include any burden which affects only a Minister of the Crown or government department.”</p> | <p>Clause 1(3):</p> <p>“In this section ‘burden’ means any of the following --</p> <p>(a) a financial cost</p> <p>(b) an administrative inconvenience</p> <p>(c) an obstacle to efficiency, productivity or profitability; or</p> <p>(d) a sanction, criminal or otherwise, for doing or not doing anything in the course of any activity.”</p> <p>Clause 1(4):</p> <p>“Provision may not be made...in relation to any burden which affects only a Minister of the Crown or government department, unless it affects the Minister or department in the exercise of a regulatory function.”</p> <p>Clause 1(5):</p> <p>“For the purposes of subsection (2), a financial cost or administrative inconvenience may result from the form of any legislation (for example, where the legislation is hard to understand)”.</p> |
| <p>What the order may do</p> | <p>Section 1(6):</p> <p>“The provision that may be made by order under this section includes-</p> <p>(a) provision amending or repealing any enactment,</p> <p>(b) provision creating or imposing, or authorising or requiring the creation or imposition of, anything which would be a burden but for the fact that it affects only a Minister of the Crown or</p> | <p>Clause 1(7) [in relation to the power to remove or reduce burdens]:</p> <p>“...the provision that may be made...includes --</p> <p>(a) provision conferring functions on any person (including functions of legislation or functions relating to the charging of fees),</p> <p>(b) provision modifying the functions conferred on any person</p> |

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| | <p>government department, and</p> <p>(c) such incidental, consequential, transitional or supplemental provision as the Minister thinks appropriate.”</p> | <p>by any enactment</p> <p>(c) provision transferring, or providing for the transfer or delegation of, the functions conferred on any person or enactment</p> <p>(d) provision abolishing a body or office established by or under an enactment,</p> <p>and provision made by amending or repealing any enactment.”</p> <p>Clause 2(1) [in relation to the power to promote regulatory principles]:</p> <p>“...the provision that may be made...includes --</p> <p>(a) provision modifying the way in which a regulatory function is exercised by any person,</p> <p>(b) provision amending the constitution of a body exercising regulatory functions which is established by or under an enactment,</p> <p>(c) provision transferring, or providing for the transfer or delegation of, the regulatory functions conferred on any person</p> <p>(d) provision creating a new body to which, or a new office to the holder of which, functions are transferred (under the preceding bullet point),</p> <p>(e) provision abolishing a body or office established by or under an enactment,</p> <p>and provision may be made for amending or repealing any enactment.”</p> |
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| <p>Restrictions on use of power</p> | <p>Section 3—Limitations on order-making power</p> <p>“(1) An order under section 1 may be made only if the Minister making the order is of the opinion that the order does not-</p> <p>(a) remove any necessary protection, or</p> <p>(b) prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise.</p> <p>(2) An order under section 1 may create a burden affecting any person in the carrying on of an activity only if the Minister is of the opinion-</p> <p>(a) that the provisions of the order, taken as a whole, strike a fair balance between the public interest and the interests of the persons affected by the burden being created, and</p> <p>(b) that the extent to which the order removes or reduces one or more burdens, or has other beneficial effects for persons affected by the burdens imposed by the existing law, makes it desirable for the order to be made.</p> <p>(3) If an order under section 1 creates a new criminal offence, then, subject to subsection (4), that offence shall not be punishable-</p> <p>(a) on indictment with imprisonment for a term exceeding two years, or</p> <p>(b) on summary conviction with imprisonment for a term exceeding six months or a fine exceeding</p> | <p>Clause 4—Preconditions</p> <p>“(1) A Minister may not make provision under section 1(1), 2(1) or 3(1) unless he considers that the conditions in subsection (2), where relevant, are satisfied in relation to that provision.</p> <p>(2) Those conditions are that—</p> <p>(a) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means;</p> <p>(b) the effect of the provision is proportionate to the policy objective;</p> <p>(c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;</p> <p>(d) the provision does not remove any necessary protection;</p> <p>(e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.”</p> <p>Clause 6—Taxation</p> <p>“(1) An order under this Part may not make provision to impose or increase taxation.”...</p> <p>Clause 7—Criminal penalties [similar to 2001 Act]</p> <p>Clause 8—Forcible entry etc [similar to 2001 Act]</p> <p>Clause 9—Excepted enactments</p> |
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| | <p>level 5 on the standard scale.”</p> <p>“(5) An order under section 1 shall not contain any provision-</p> <p>(a) providing for any forcible entry, search or seizure, or</p> <p>(b) compelling the giving of evidence,</p> <p>unless a provision to that effect is contained in an enactment repealed by the order and the powers conferred by the provision to that effect contained in the order are exercisable for the same purposes as the powers conferred by the repealed enactment or for purposes of a like nature.”</p> <p>Section 1(4) :</p> <p>“No order made under this section may be made for the purpose of reforming the law contained in any provision of an Act if that provision has been amended...</p> <p>(a) by an Act passed not more than two years before the day on which the order is made, or</p> <p>(b) any subordinate legislation made not more than two years before that day...”.</p> | <p>“An order under this Part may not make provision amending or repealing any provision of ---</p> <p>(a) this Part; or</p> <p>(b) the Human Rights Act 1998”.</p> |
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APPENDIX 3: EXTRACT FROM QUINQUENNIAL REVIEW OF THE LAW COMMISSION BY JOHN HALLIDAY CB (MARCH 2003)

The Legislative Process

7.10 When primary legislation is needed to act on completed reports, the first hurdle is for the relevant Department to secure a place in the Government's legislative programme. The more that the Commission can say about the anticipated impact of its proposals on costs and benefits, the more likely it is to be able to persuade the relevant Department of the importance of acting upon them, and to enable it to persuade the Ministerial Committee on the Legislative Programme (LP Committee). The proposals in chapter 2 and chapter 3 of this report should result in a programme that has a high level of Government commitment. Even so, competition for places will remain high.

7.11 The review has examined the prospective reforms of procedure in both Houses of Parliament in order to estimate their effect on Law Commission Bills. Some undoubtedly hope and believe that procedural changes, especially greater use of Grand Committee and September sittings in the House of Lords, and the ability to "carry over" Bills from one Session to another, will benefit Law Commission Bills.

7.12 Taking the evidence presented to the review as a whole, it would be rash to assume at this stage that procedural changes in the two Houses of Parliament will necessarily have a significant effect on the prospects for Law Commission Bills. This is because of current uncertainties about how the changes will operate in practice, and because clear statements have been made that the reforms are not intended to increase the overall volume of legislation. Also, as none of the proposed procedures are geared specifically toward Law Commission Bills, which will remain in competition with mainstream Bills, they will benefit from the changes only after they have surmounted the hurdle of winning a place in the Legislative Programme. As already noted, the Government's intention to publish more Bills in draft for consultation fits well with existing Law Commission practices, but it is not clear that of itself this will increase the likelihood of winning a place in the legislative programme.

7.13 The best chance of increasing the likelihood of take up of Law Commission Bills, consequent upon Parliamentary reforms, lies in Departmental Ministers offering to use the new opportunities to maximum effect, and with minimal effects on the rest of the Government's legislative programme. To introduce a Bill late in the Session, with a view to carrying it over into the next Session, and using September sittings of the Grand Committee in the House of Lords, could offer significant advantages from the point of view of the managers of the legislative programme. In proposing inclusion of Law Commission Bills in the Government's proposals, Departments should ensure that their Ministers are able to make the most of the procedural possibilities that are, or should become, suitable for Law Commission Bills.

Special Parliamentary procedures

7.14 Consolidation Bills and Statute Law (Repeals) Bills already have the advantage of special Parliamentary procedures that work successfully. Many have long looked for similar "expedited" procedures for substantive law reform measures emanating from the Law Commission. A Special Public Bill Committee exists in the House of Lords to examine non-controversial but technical Bills (the

Jellicoe Procedure). Evidence to this review suggests that experience of Jellicoe has been disappointing, particularly because the evidence stage was found to consume considerable amounts of Ministerial and official resource, without sufficiently beneficial reduction in time on the floor of the House. The Jellicoe procedure is still available but has not been used since the previous quinquennial review.

7.15 The review was told of proposals at the time of the Regulatory Reform Act that would have created procedures for certain types of law reform that were analogous with the procedures for RROs. Those proposals were not adopted. This review is not in a position to argue for their adoption, but is of the view that the search for procedural reform to facilitate Law Commission Bills should not be abandoned. In support of this, the review was told that special procedures had been established by Parliament to facilitate legislation flowing from the Tax Law Rewrite Project, that is being managed by the Inland Revenue with aims comparable to those of the Law Commission. Endnote 9 This demonstrates a willingness in Parliament to adopt special procedures where appropriate. A difficulty for the Law Commission is that its proposals cover a wide field, parts of which are likely to be controversial and demand full Parliamentary scrutiny. Defining the sort of Law Commission Bills (other than consolidation) that might benefit from a special procedure is likely to be problematic.

Conclusions

7.16 The Commission should make use of review points in project management to reassess:

- * the most appropriate method of implementation; and
- * the need for draft legislation or orders.

7.17 Departments and the Law Commission should keep closely in touch with developing changes in Parliamentary procedure, and Governmental management of the legislative programme, with the aim of exploiting any opportunities that arise.

7.18 The search for new procedural devices to facilitate Parliamentary scrutiny of Law Commission Bills needs to be invigorated. Without new procedures there will be continuing risks of worthwhile law reforms, including codified criminal law, not being implemented, or being implemented only after long delays. A special scrutiny procedure, on the analogy of that created for the Tax Law Rewrite project could perhaps be used to determine which Bills were suitable for the special procedure. The Lord Chancellor's Department should work on identifying and appraising procedural options, in consultation with all interested parties in Government and Parliament. This will require high levels of skill, leadership and application; in order to deliver the project the Department will need to give it a high priority.

Recommendations

R27) The Law Commission should retain its capacity to draft Bills and RROs, but before deciding to use its drafting capacity in an individual project it should be satisfied that the likelihood of action on its proposals is sufficiently high to justify the effort involved.

R28) The Law Commission and Departments should use the prospective benefits of their proposals to support their bids for places in the legislative programme.

R29) Departments with responsibility for Law Commission Bills should make sure that they take full advantage of the handling opportunities offered by the current Parliamentary reforms, when arguing for inclusion of these Bills in the legislative programme.

R30) The Lord Chancellor's Department—in consultation with the Law Commission, other Government Departments (including the Government's business managers) and the relevant Parliamentary authorities—should initiate a project aimed at identifying special Parliamentary procedures to facilitate scrutiny of Law Commission Bills.