**RESEARCH PAPER 06/06**
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# The *Legislative and Regulatory Reform Bill*

## Bill 111 of 2005-06

The *Legislative and Regulatory Reform Bill 2005-06* extends the scope of the powers available to Ministers to amend statute law by Order and at the same time relaxes the constraints of parliamentary scrutiny on the Order making process.

The wide-ranging power in Part 1 of the Bill potentially allows ministers to amend, repeal or replace any legislation, although the Government has committed itself to not using the procedure to deliver "highly political measures".

The Constitution Committee of the House of Lords has expressed its concern at the "unprecedentedly wide powers" the Bill seeks to confer on Ministers.

The Bill will allow ministers to require regulators to adhere to a code of practice, based on principles that were enumerated in the Hampton Review, *Reducing administrative burdens*. It also seeks to simplify the process of updating technical European Union regulations.

A "Sewel motion" was introduced in the Scottish Parliament to allow Westminster to introduce the latter simplification in Scotland.

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# Summary of main points

Under the provisions of the *Regulatory Reform Act 2001*, the Government can propose regulatory reform orders, which allow statute law to be amended by delegated rather than primary legislation. The Government has acknowledged that the Act was "constitutionally ground breaking". However, there are a number of conditions on the use of such orders. The procedures that have to be followed before an Order can be made are set down in the Act and supplemented by the House of Commons Standing Orders. These include a two-stage consideration of orders by committees in both Houses of Parliament (the super-affirmative procedure). Despite anticipating 50 regulatory reform orders when the Bill was going through Parliament in 2000-01, only 27 Orders had been made by the end of 2005. The Government has identified a number of reasons for this, including the inflexibility of the parliamentary process, the requirement that an order removes a legal burden and the need for the order to be finalised before it comes before Parliament, unlike a bill which can be amended as it proceeds.

The Regulatory Reform Committee, which scrutinises Government proposals for regulatory reform orders, has expressed concern about both the under-utilisation of the procedure and about departments' poor understanding of the process. It regularly encourages Cabinet Office ministers to promote and explain the procedure more.

In 2005, the Government undertook a review of the Act and consulted on a new "Bill for Better Regulation". Throughout the process of reviewing the *Regulatory Reform Act 2001* and consulting on the new Bill, the Government has emphasised the deregulatory aspect of the process. The consultation process indicated that orders made under any new procedures would be required in most cases to remove burdens. However, the provisions in Part 1 of the Bill are far wider than those in the 2001 Act. They allow Ministers to use statutory instruments to amend, repeal or replace **any** legislation (Clause 2 (1)). The only exceptions are that such orders may not (1) impose or increase taxation; (2) create offences or increase the penalty for offences that are punishable by imprisonment for not more than two years, on indictment; or for 51 weeks, on summary conviction; or levy a fine exceeding level 5 on the standard scale; or (3) authorise forcible entry, search or seizure; or compel the giving of evidence.

Ministers have argued that safeguards on the face of the Bill, and scrutiny by the parliamentary committees, will prevent inappropriate use of the powers.

Before parliamentary consideration of a regulatory reform order begins, it must have been the subject of consultation. That requirement is retained. However, the Bill proposes major changes to the way in which Parliament scrutinises the orders. At present all regulatory reform orders are subject to the super-affirmative procedure.

The Bill would allow the Minister seeking to make changes to primary legislation to introduce orders that were subject to the negative, affirmative or super-affirmative procedures. The Minister would have to explain why he recommended the particular course of action. When the negative or affirmative resolutions procedures were recommended, either House would have 21 days to resolve that a more rigorous procedure should be applied.

During the passage of the *Regulatory Reform Act 2001*, the Government gave a commitment that it would not use the order making power to implement "large and controversial" measures. Jim Murphy, the Cabinet Office Minister, told the Regulatory Reform Committee that the *Legislative and Regulatory Reform Bill* would not be used to implement "highly controversial" measures. The Government has suggested what is controversial at one time is not necessarily controversial at another time, so the degree of controversy associated with a particular proposal would need to be assessed on a case-by-case basis. However, it has "reiterated its commitment not to use Order powers to deliver highly political measures, such as amendments to terrorism law or the Parliament Act".

In a letter to the Lord Chancellor and Secretary of State for Constitutional Affairs, Lord Holme, the chairman of the Constitution Committee in the House of Lords, expressed his Committee's concern about the nature of the powers contained in the Bill:

> … 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.[1]

The Regulatory Reform Committee published a report on the Bill on 6 February 2006. It considered that the Bill "has the potential to be the most constitutionally significant Bill that has been brought before Parliament for some years".[2] On 7 February, the Procedure Committee is taking evidence from Jim Murphy as it considers "whether the parliamentary procedures proposed in the Bill are appropriate for the extension to the powers which the Government is now proposing".

Part 2 of the Bill concerns regulators: its origins lie in some of the recommendations of the Hampton Review on *Reducing administrative burdens*. It places a duty on regulators to adhere to certain principles in performing their duties; and allows Ministers to issue and revise a code of practice for which specified regulatory bodies would be subject to.

Part 3 of the Bill brings forward measures that were included in the *European Union Bill 2005-06*, which has since been shelved, to allow technical amendments made to European Community legislation to come into effect automatically in the UK without the need to amend domestic regulations made to implement the original European legislation.

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1 Constitution Committee, *Letter from the Chairman to the Lord Chancellor and Secretary of State for Constitutional Affairs*, 23 January 2006, http://www.parliament.uk/documents/upload/Letter%20to%20Lord%20Chancellor%2023%2001%2006%20%28word%29.doc

2 Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 6 February 2006, HC 878 2005-06 p3

At present only regulations can be used to implement European Community measures. The Bill would allow other forms of delegated legislation to be used to do so.

The Bill inserts a definition of the European Economic Area agreement and of a member state of the EEA into the *Interpretation Act 1978*.

A “Sewel motion” was introduced in the Scottish Parliament to allow Westminster to allow the changes to procedures in relation to European Community instruments to be implemented in Scotland.

# CONTENTS

# I Introduction and Structure of the Paper

Since the *Regulatory Reform Act 2001* came into force, the Regulatory Reform Committee has continued to review the regulatory reform process, take evidence from ministers and officials, and react to the Government's responses. In addition, during the passage of the Act through Parliament, the Government committed itself to a review of the Act, after three years. The Government's formal review was delayed because of the limited use that had been made of the regulatory reform procedures. In place of the full review of the Act in 2004, the Government undertook a "partial review", which was submitted to the Committee.

Between 2001 and 2005, a number of issues arose as the process developed and were highlighted in the Committee's reviews and the Government's responses. Those that had not been resolved by the Government and the Committee were considered by the Government in its formal review of the Act, which was published in June 2005. Alongside its review, Government published a consultation paper – *A Bill for Better Regulation* – seeking views on how to reform the Act. It published a summary of the responses in December 2005. The process culminated in the publication of the *Legislative and Regulatory Reform Bill* on 11 January 2006, which is expected to have its second reading on 9 February 2006.

The Bill contains three distinct elements. Part 1 of the Bill introduces a wide-ranging power that potentially allows ministers to amend, repeal or replace any legislation. Part 2 of the Bill allows Ministers to establish a code of practice that may be imposed on regulators, in line with the recommendations of the Hampton Review on reducing administrative burdens; and Part 3 of the Bill introduces some measures to simplify the implementation of European Community instruments.

The Research Paper therefore considers the review of the *Regulatory Reform Act 2001* and Part 1 of the Bill first (section II). Then in section III and IV the other two parts of the Bill are reviewed.

Having discussed the Bill and the immediate background to the measures it contains, section V of the Research Paper reviews the development of the deregulation debate. It includes a review of the development of the regulatory reform procedure, which outlines the rationale for the previous extension of order making powers and the parliamentary procedures for delivering regulatory reform orders.

Finally, in section VI various other approaches to reduce the regulatory burdens facing businesses are described. A number of initiatives and ideas, such as better regulation are outlined; a brief overview of the governmental structures underlying these initiatives and a note on the particular problems facing small businesses are also given.

# II Reforming legislation by order

## A. Review of the *Regulatory Reform Act 2001* and consultation on a Better Regulation Bill

### 1. The Review

In July 2005, the Better Regulation Executive, within the Cabinet Office, published the review of the *Regulatory Reform Act 2001*, originally promised by Lord Falconer during the passage of the *Regulatory Reform Bill* in 2001.

Although only 27 regulatory reform orders (RROs) had been made under the powers available in the Act, against a target of 60 (by the end of March 2006), the review identified "many positive aspects to the Regulatory Reform Order process".[3] The review also identified a number of drawbacks in the process. It provided the following summary:

> The review has identified many positive aspects to the Regulatory Reform Order process:
>
> - at a basic level the current framework is effective: at the end of July 2005 27 RROs have been made, all of which have delivered benefits to a wide range of interest groups and public bodies, including business, charities, local authorities and tenants.
>
> - individual RROs have delivered specific cost benefits, […];
>
> - requirements for consultation are important and help clarify which elements of proposals might be controversial.
>
> - parliamentary scrutiny is thorough and effective.
>
> - the safeguards, including the need to maintain necessary protection and protect rights and freedoms, have worked well, and remain essential.
>
> However the review also finds that:
>
> - The RRA lacks a clear, overarching purpose. The current objects of the RRO power are essentially technical. The RRA provides powers for the purposes of removing, reducing, re-enacting or imposing burdens and for the removal of inconsistencies and anomalies. This skews the preparation and scrutiny of proposals towards the identification and analysis of specific legal restrictions rather than to the overall benefits of the reform.
>
> - The concept of burdens, which is central to the Act, is complex and burdensome to apply; it also limits the scope of reforms which can be delivered by RRO.

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[3] Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p6, http://www.cabinetoffice.gov.uk/regulation/documents/pdf/br_act_review.pdf

- In particular, RROs cannot clarify or simplify legislation unless in so doing burdens are removed, reduced, re-enacted or imposed.

- The Act has not enabled the delivery of uncontroversial Law Commission recommendations as effectively as expected,

- Specific restrictions on the current powers also complicate the preparation of RROs and limit the scope of proposals […].

It also commented that "the parliamentary procedures for RRO proposals are disproportionate for smaller reforms".[4]

Following a brief introduction to the regulatory reform order making power, in which it concluded:

> Overall the 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. The subsequent chapters to this Review seek to analyse why this is the case.[5]

the review concentrated on five issues:

- the concept of burdens;
- restrictions on the power;
- safeguards;
- procedures; and
- appropriateness/controversy.

### *a. Burdens*

The *Regulatory Reform Act 2001* allows a minister to use an RRO to reform legislation which imposes burdens on persons carrying out activities. The powers in the Act can be used to remove, reduce, re-enact or impose burdens. The Act defines burdens, but the review of the Act noted that the definition did not encompass "the ordinary meaning of burden [which] could include the administrative bother or expense associated with legislation".[6]

This section of the review also discussed the limited use of RROs in implementing appropriate Law Commission recommendations, and reported the Regulatory Reform Committee's view that new powers were not required to remove errors and omissions from existing legislation. In the latter context, the review noted that:

> … the RRO process is neither quick nor easy. The average time to deliver an RRO is over 18 months. As recognised by the BRTF [Better Regulation Task Force], the RRO process is "resource intensive", and is not undertaken lightly. In

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4 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, pp6-7
5 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p13
6 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p14

> these circumstances, the Government considers it unlikely that departments would lightly use the RRO process to correct errors and omissions.[7]

### *b. Restrictions on the power*

The review included a list of things that RROs cannot be used to do:

> They cannot:
> - reform the common law
> - reform legislation without removing or reducing a burden
> - remove burdens which only affect Ministers or government departments
> - reform legislation less than two years old, or provisions of legislation that have been amended in substance during the previous two years
> - create a new criminal offence punishable with more than two years' imprisonment on indictment, or on summary conviction (in England and Wales), with more than 51 weeks' imprisonment or a fine of more than £5000
> - provide for forcible entry, search or seizure or compel the giving of evidence
> - sub-delegate powers (i.e. create new powers to make binding rules or extend existing powers)

The review considered each of these restrictions in turn.

In the case of both the arguments about the need for an activity to be ongoing and the limits that prevent removing burdens that only affect Government, the support of the Regulatory Reform Committee for removing these restrictions was noted.

In the review, the Government outlined its intention to retain the requirement that all RROs must remove or reduce a burden. However, it considered that this should not be a requirement of the proposed new powers to simplify law or to implement Law Commission recommendations. (The Bill removes the concept of burdens entirely.)

The review announced the Government's intention to remove the rule that prevents RROs from making changes to statute law or secondary legislation that is less than two years old.[8]

The review reiterated the Government's desire to provide full powers to sub-delegate legislation in RROs – that is an RRO could include provisions to allow Ministers to bring forward further statutory instruments to implement further measures resulting from the RRO. However, it noted that although the Regulatory Reform Committee considered there was a case for "a certain degree of sub-delegation" for orders delivering Law Commission recommendations, the Committee had reservations in the RRO process:

> The RRC has suggested that the introduction of a power to sub-delegate would be a constitutionally significant extension of the RRO process. They consider that any proposal to introduce a power to sub-delegate would require very careful

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7 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p18

8 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, pp19-25

> consideration by the House and would require significant safeguards for the exercise of the power.[9]

The review considered that there was no need to increase powers in relation to creating criminal offences.[10]

### *c. Safeguards*

The review described two types of safeguards. First, those that applied to any proposal for an RRO and, second, those that applied to RROs which re-enact or impose burdens:

The first group of safeguards comprise: (i) a requirements that an order maintains protection the Minister considers to be necessary; and (ii) a reasonableness test – the Minister has to be "of the opinion that [an RRO] does not prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to enjoy".

The safeguards applying to RROs which re-enact or impose burdens are:

> (i) the burden has to be proportionate to the benefit expected to be gained;
>
> (ii) the Minister must be of the opinion that "a fair balance is being struck between the interests of the persons affected by the burden and the interests of the public at large"; and
>
> (iii) the Order must be desirable, in terms of either the reduction or removal of other burdens, or other benefits it confers on people affected by existing burdens.[11]

The Government considered that all the safeguards had worked well and concluded:

> Since the current safeguards are now well embedded, the Government suggests that they should be applied to the extended powers in their entirety, including the removal and reduction of burdens, implementation of Law Commission recommendations and simplification measures…[12]

The review reported that a number of recent proposals for RROs had not progressed because they involved the reform of private or hybrid legislation. Although nothing in the *Regulatory Reform Act 2001* would have prevented this, there were different parliamentary procedures for such legislation. The Government was minded to permit the reform of private or hybrid legislation by order, as part of a wider reform package, but noted that it would need to take into account the need for additional safeguards in relation to private rights and interests.[13]

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9 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p26
10 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, pp26-27
11 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, pp28-30
12 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p30
13 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p31

### *d. Procedures*

The *Regulatory Reform Act 2001* sets out the requirements for the public consultation which precedes parliamentary scrutiny of regulatory reform orders. In its review of the Act, the Government noted:

> Consultation has proved an important and successful part of the RRO process. As RROs amend primary legislation via secondary legislation, it is vital that proposals are publicised so that stakeholders are aware of the changes, and have an opportunity to comment.[14]

It also announced that it had no proposals for changing the consultation process, although it hoped other changes would make it easier to analyse proposals.

The provisions in the *Regulatory Reform Act 2001* that permit confidential responses to consultations are being reviewed separately to examine "whether the procedure might constitute a bar to the disclosure of information under the Freedom of Information Act 2000".

The super-affirmative procedure

The *Regulatory Reform Act 2001* provides for proposals for orders to be laid before Parliament for 60 days. A proposal for an order is essentially a draft of the order and a report on the need for it. In the House of Commons, the Regulatory Reform Committee is responsible for reporting on all these proposals. The Standing Order establishing the Committee sets out the nature of the report that it must present to Parliament – the Standing Order is included as Appendix 1 to this Research Paper. Once the Committee has reported, the Government can make amendments recommended by the Committee. The Government then lays a draft Order for a further 15 days' scrutiny. If both the Commons and the Lords committees report favourably, the Government proposes a motion to make the Order.

The Government's review reiterated its concern that "the 60 day initial scrutiny period remains constant irrespective of the size or complexity of the proposal" and commented that "the full super-affirmative procedure is disproportionate for small reforms".[15] It also outlined some of the options considered when the *Regulatory Reform Bill* was going through Parliament in 2001: such as proceeding within 60 days if the Committee had reported, and doing away with the second scrutiny period if the proposal was not amended.

The Government pointed out that some officials had suggested that "there should be fast-track procedures for small proposals".[16] In some cases, officials were surprised how quickly proposals were considered and would have liked longer to respond to questions from the Committees.

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[14] Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p32
[15] Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p34
[16] Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p35

The Government acknowledged the Regulatory Reform Committee's concerns about shorter periods of consideration for smaller proposals. Nevertheless, the Government saw "no reason in principle why departments could not consider what length of scrutiny might be appropriate while developing proposals",[17] noting that there were already a range of ways in which primary legislation could be amended by secondary legislation:

| **Enabling Act** | **Procedure** |
|---|---|
| *Regulatory Reform Act 2000* | super-affirmative procedure |
| *Local Government Act 2000* | super-affirmative procedure |
| *Health Act 1999* | affirmative procedure |
| *European Communities Act 1972* | affirmative or negative procedure |
| *Electronic Communications Act 2000* | affirmative or negative procedure |

and that the Regulatory Reform Committee had suggested that the super-affirmative procedures may not always be necessary to implement Law Commission recommendations.

### *e. Appropriateness*

In introducing the part of the review of the Act that dealt with assessing whether an RRO was an appropriate means of amending the law, the Government described the *Regulatory Reform Act 2001* as "constitutionally ground breaking".[18] In the review the Government pointed out that there was nothing on the face of the Act to assist in determining the appropriateness but the Government quoted a series of undertakings given by Lord Falconer, during the Bill's passage through Parliament:

On second reading in the House of Lords, he said:

> Highly controversial measures will naturally remain more suited to debate on the floor of the House.[19]

During the Committee stage, he said:

> We are dealing with orders that are not politically controversial, although there may be controversy about the detail. If they were politically controversial to a serious extent, that would not be appropriate for a regulatory reform order. We are discussing matters that would otherwise have to be dealt with in primary legislation, although it would be difficult to find time in legislative programmes, which are often crowded.[20]

And at report stage, he said:

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17 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p37
18 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p42
19 HL Deb 21 December 2000 c852
20 HL Deb 23 January 2001 c209

> The power in the Bill is not suited to large and controversial measures. A highly controversial issue would come up against serious problems in the consultation period.[21]

In addition, both the Regulatory Reform Committee and the House of Lords Delegated Powers and Regulatory Reform Committee are required to consider whether the proposal is appropriate.[22]

The Government argued that "controversy must be identified on a case-by-case basis". It concluded that "The test is not an objective, legal one but a political one capable of responding to changing political circumstances". It then outlined the tests for appropriateness made during the preparation and scrutiny of proposals for an order:

> Ministers first decide whether their proposals are appropriate, and then test this assessment during consultation, before laying an RRO for scrutiny. The Committees then judge whether they agree that the proposals are appropriate for delivery by RRO.[23]

Both Committees have questioned whether they are always competent to determine whether it is appropriate for a particular proposal to be taken forward by order and asked whether there should be a mechanism for them to refer subjects to the whole House for debate at an earlier stage (at present, the whole House only considers a draft Order, once it has been scrutinised twice by the Committee). The review noted that the then Minister, Ruth Kelly, had said that the Government would consider suggestions from the Committee as to how to improve the process.[24]

## 2. The consultation process for the Better Regulation Bill

On the same day as it published the review of the *Regulatory Reform Act 2000*, the Government also published a consultation paper – *A Bill for Better Regulation: Consultation Document*.[25] The emphasis of the consultation was better regulation: the Government linked its consultation document with the Hampton Review on *Reducing administrative burdens* and the Better Regulation Task Force's report, *Regulation – Less is More: Reducing Burdens, Improving Outcomes*. The list of consultees who received the document reflected this.[26] The questions in the consultation process did not reflect the constitutional implications of the Government's proposals.

Both the recommendations made by the Government and the stakeholders reaction to them are outlined in the following sections. Some comments from the Regulatory Reform Committee's evidence session with Jim Murphy on the review and consultation are also included.

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21 HL Deb 13 February 2001 c186
22 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p42
23 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p42
24 Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, pp43-46
25 Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, http://www.cabinetoffice.gov.uk/regulation/documents/pdf/consultation_doc.pdf
26 Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, pp45-46

### *a. Overview*

On 13 December 2005, the day before the Cabinet Office published the summary of the consultation responses the Regulatory Reform Committee held an evidence session on the operation of the *Regulatory Reform Act* 2001, with the Cabinet Office Minister, Jim Murphy. It had originally planned to take evidence from John Hutton on 8 November 2005 but that session was cancelled after his appointment as Secretary of State for Work and Pensions. (Mr Hutton had only taken up his position in the Cabinet Office after the General Election in May 2005.)

Mr Murphy argued that he Government's case for changing the regulatory reform process was based on more than anecdotal evidence, as suggested by Andrew Miller, the chairman of the Regulatory Reform Committee:

> I think the Government's case for the review is based on the evidence post 2001, and the limited effectiveness of the Regulatory Reform Act 2001 and its ability to deliver important regulatory reform but not everything that was anticipated at the time. There are various reasons for that, some of which I am sure we will explore in discussion. I do not share the sense that it is based on anecdotal experience of departments with no personal or direct involvement in this agenda. The fact is that the Act of 2001 was too narrowly defined in the sense of burdens. It made a very technical definition of burdens and it did not allow uncontroversial Law Commission proposals to be introduced. It really was not flexible enough, largely based on the fact that there was this tight definition of burdens. So I do not think it is based on anecdotal experience at all; it is based on having a genuine, ambitious better regulation agenda which sometimes collides with a rather narrowly drawn legal definition of burdens. [27]

Andrew Miller also commented that "By proposing to widen the scope of the procedure, the Cabinet Office is suggesting constitutionally significant changes to the way that primary legislation can be amended", and asked whether anyone outside Government was demanding such a power. In response, Mr Murphy highlighted support from the business organisations such as the Confederation of British Industry, and the Law Commissions.[28]

Alison Seabeck and the Minister, also exchanged views on the differences in the procedures for dealing with Bills and RROs and the implications that had for those officials responsible for drafting the two different for vehicles for introducing changes to the law:

> Alison Seabeck: One major distinction between Bills and RROs is that RROs require departments to finalise their work on policy before the proposal is laid whereas with a bill, as it goes through the processes in Parliament, there are numerous opportunities to make amendments and changes. To what extent does

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[27] Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001 – uncorrected oral evidence (13 December 2005)*, 19 December 2005, HC 774-I 2005-06, Q3

[28] Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001 – uncorrected oral evidence (13 December 2005)*, 19 December 2005, HC 774-I 2005-06, Q4

> that difference explain some of the difficulties that some departments may have with RROs?
>
> Mr Murphy: It does go some way to explaining it on the basis of you have got to have everything together and that is it, whereas with a bill you can go through various stages. You can say, "We will sort that out in three months' time". I am not saying that is what happens, it is not going to happen with this Bill. I was a Government Whip for three years.[29]

### *b. Regulatory Reform Order powers*

Although the Government announced that it proposed to extend the scope of regulatory reform orders (RROs) it argued that this would "make them an outcome-focused tool for the effective delivery of better regulation":

> The Government specifically proposes that RRO powers should be extended so that it is possible to amend or repeal primary legislation in order to do **one or more** of the following three things:
>
> - remove, reduce, re-enact or impose burdens (as now);
> - simplify legislation; and
> - implement uncontroversial Law Commission recommendations, including those that amend common law.[30]

It commented:

> We would like this power to be as flexible as possible while still reflecting the safeguards and working within appropriate procedures. We recommend that the simplification and Law Commission powers should not be linked to the removal or reduction of burdens.[31]

However, the Government recognised that Parliament would not give it an open-ended power to reform legislation by order:

> If we broaden the RRA [Regulatory Reform Act 2001] powers to explicitly allow simplification (as defined by the examples above) but allow only very limited substantive reform, the risk is that we would create similar rigidities and unintended consequences to those currently experienced in using the framework of burdens. While we recognise that it would not be acceptable to Parliament for an amended RRA to give an open-ended power to reform legislation by RRO, we would like to explore whether there are specific identifiable instances where the simplification power, like the burdens power should be able to enable substantive reform.[32]

The Government sought views on the following issues:

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29 Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001 – uncorrected oral evidence (13 December 2005)*, 19 December 2005, HC 774-I 2005-06, Q75

30 Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p7

31 Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p15

32 Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p11

> • Do you think it is appropriate that RRO powers should be extended to allow the implementation of simplification measures and uncontroversial Law Commission recommendations?
>
> • Are there other ways in which the powers should be widened in order to enable the delivery of better regulation and law reform measures?
>
> • Do you agree that the simplification and Law Commission powers should be separate from the burdens element?[33]

After the consultation, the Government reported that "there was overwhelming support for extending RRO powers to allow the implementation of simplification measures and uncontroversial Law Commission reports". But it also noted that there were concerns over how "'non-controversial' Law Commission recommendations would be defined".[34] (A note of the Law Commission's responsibilities is given in Appendix 2.)

The Government reported that a number of respondents criticised the concept of burdens in the RRA. The Government announced:

> … the concept of burdens has been removed, and new Orders should be delivered under a general power to reform legislation. This power will be limited by a series of safeguards similar to those in the RRA and other limitations.[35]

### *c. References to activity and burdens on Ministers*

The *Regulatory Reform Act 2001* refers to activity, which the Government suggests an ongoing process, which in turn means that one-off regulatory requirements cannot be reformed using the regulatory reform order procedure. The Government consulted on removing references to activity (Recommendation 2) and the block on removing burdens that were only faced by Government (Recommendation 3).[36]

The Regulatory Reform Committee had endorsed these developments, as long as they did not result in further burdens on individuals, and the consultation respondents also supported them. The Government reported that "no respondents specifically objected" to the removal of references to activity.[37] It also reported that Recommendation 3 was "strongly supported" and that it would remove that block. The Government argued that retaining the existing safeguards "will prevent the removal of burdens on government from unfairly affecting individuals or other organisations".[38]

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33 Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p15
34 Cabinet Office, *A Bill for Better Regulation Summary of Consultation Responses*, December 2005, pp6-7, http://www.cabinetoffice.gov.uk/regulation/documents/pdf/consultation_responses.pdf
35 Cabinet Office, *A Bill for Better Regulation Summary of Consultation Responses*, December 2005, p8
36 Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p15
37 Cabinet Office, *A Bill for Better Regulation Summary of Consultation Responses*, December 2005, p10
38 Cabinet Office, *A Bill for Better Regulation Summary of Consultation Responses*, December 2005, p11

### *d. Recommendations relating to simplifying the law*

Although it is already possible to use RROs to implement certain Law Commission recommendations, they have not been widely used to do so. In the consultation document the Government had already identified simplifying legislation as an objective. So it also consulted on how the simplification powers should be defined:

> Recommendation Two (sic) above proposes extending the existing powers in the RRA to include the simplification of legislation. Under this we include:
>
> • the removal of unnecessary or obsolete provisions;
>
> • the consolidation of legislation (i.e. the bringing together of disparate pieces of legislation, to remove overlaps and make the whole more accessible and transparent);
>
> • the clarification of legislation, i.e. resolving doubts and ambiguities about its meaning;
>
> • restating the law, with a view to improving transparency, coherence or accessibility; and
>
> • the correction of minor errors and omissions, e.g. failure to make necessary consequential provision.
>
> We would like to allow substantive amendments where it can be demonstrated that they are consensus-driven/uncontroversial and meet all the safeguards (see below for an analysis of safeguards) and where it would inhibit the overall reforms proposed if substantive change was not allowed.
>
> Questions
>
> • Do you agree that proposed simplification powers should be defined in this way?
>
> • Are there additional examples of simplification that we should include in the scope of the powers?
>
> • Do you agree that the simplification power should allow for some substantive amendments to legislation? In what circumstances would substantive change be appropriate?
>
> • Do you agree that the proposals on simplification should be able to deliver substantive change, if appropriate, where data and information sharing is necessary to remove burdens or simplify and improve processes?
>
> • Are the safeguards proposed adequate or are there specific data-sharing issues that would mean that additional safeguards would be necessary?

> • Can you identify any specific instances where responsible data-sharing would remove burdens on business or others?[39]

The Government also recommended that as long as the safeguards were maintained the power to implement Law Commission recommendations should be extended to include recommendations for reform of common law (Recommendation 5). It asked consultees whether there "should be a power to implement Law Commission recommendations by Order and that the power should extend to proposals for the reform of common law".[40]

There was widespread support for allowing RROs to simplify legislation. In addition, there was "strong agreement that simplification should include the changes to the substance of legislation", and support to allow RROs to be used to allow data or information sharing where it was appropriate or would simplify or remove burdens. The Government commented:

> Regarding enhanced data and information sharing, the Government believes that the combination of full public consultation, safeguards and commitments not to deliver highly controversial measures by Order should ensure that personal or commercial data is not shared inappropriately.[41]

Whilst there was "overwhelming support for the creation of new powers to implement Law Commission reports", some respondents expressed concern over plans to allow the common law to be amended by order.

The Law Commission told the Government that "if the use of RROs to implement our proposals is to be effective, they must be able to include amendments to the common law".

The Government reiterated its commitment that only uncontroversial Law Commission reports would be implemented by order but it considered that Law Commission reports should be able to reform common law.[42]

### *e. Safeguards*

In the consultation document, the Government reiterated its plan to standardise the safeguards (se section A 1 c), so that they all applied to any type of RRO:

> We recommend that the current safeguards in the RRA should be carried forward; that these safeguards (with appropriate adjustment) should be common to all three types of Order (burdens, simplification and Law Commission recommendations); and that they should be applied across Orders in their entirety.

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39 Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, pp15-16
40 Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p16
41 Cabinet Office, *A Bill for Better Regulation Summary of Consultation Responses*, December 2005, pp12-13
42 Cabinet Office, *A Bill for Better Regulation Summary of Consultation Responses*, December 2005, p14

> We further recommend that the current requirement to detail the savings or increased costs estimated to result from the proposals should be replaced with a wider reference to the need, where appropriate, to provide an assessment of the significant impacts of proposals [Recommendation 6].

It then asked:

> • Do you agree that current safeguards should be maintained and applied comprehensively across all three types of Order?
>
> • Do you agree that the requirement to provide an estimate of savings or increased costs should be extended to cover a wider impact assessment, where appropriate?[43]

Although there were questions over whether the safeguards were "objective or sufficiently vigorous", the Government reported that the majority of respondents believed that the safeguards had worked, and they believed that they should be "maintained and applied comprehensively to all Orders".[44]

The Government confirmed its intention to modify the current safeguards and apply them to all Orders. It noted that the removal of the requirement to identify burdens would require safeguards to be rewritten. It also announced that it proposed creating a new safeguard:

> The Government intends to modify the current safeguards under the 2001 Act to reflect the extension of powers beyond just reforming the law imposing burdens as defined in the RRA. These safeguards will be applied comprehensively to all Orders.
>
> The concept of burdens is an integral part of the desirability safeguard, so it would have to be reworded to fit a power not based on burdens. Based on the review findings and the BRTF comments, the Government proposes creating a new safeguard which is substantially different from the existing safeguards. It should capture part of the aims of the better regulation agenda not covered by the existing safeguards. The Government proposes to replace the desirability test with a test to ensure that alternatives to legislation are considered before an RRO is pursued. This safeguard would require that order making powers can only be used when there is no effective alternative to legislation.
>
> The Government also considers that extending the requirement to estimate financial costs and savings to cover wider impacts will act as a more appropriate assessment of proposed reforms.[45]

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43 Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p17

44 Cabinet Office, *A Bill for Better Regulation Summary of Consultation Responses*, December 2005, pp15-16

45 Cabinet Office, *A Bill for Better Regulation Summary of Consultation Responses*, December 2005, pp16-17

### *f. Two year rule:*

The plan to abolish to the rule that prevents RROs being used to amend legislation that was changed within the previous two years was also consulted upon. The Government asked consultees whether they agreed with its plan to remove the two-year rule (Recommendation 7). Following the consultation, the Government reported that "respondents strongly agreed that the two-year rule should be removed".[46]

### *g. Sub-delegation*

The Government's desire to allow sub-delegation powers to be included in RROs was also included in the consultation. It reiterated its claim that "the lack of a power to sub-delegate has impeded the use of RROs to implement larger reforms":

> We recommend that RROs should be able to provide for full legislative sub-delegation provided that it can be demonstrated that proposals are consistent with the safeguards. This means that RROs would be able to create new secondary legislative powers (for example a power to make regulations) and/or extend existing powers.
>
> The department responsible for the Order would in the normal way specify whether regulations, rules or Orders made under such a power should be subject to negative or affirmative resolution [Recommendation Eight].[47]

While the majority of respondents agreed that RROs should be able to provide for legislative sub-delegation, there were objections. Some considered that such proposals would not receive an adequate amount of Parliamentary scrutiny. However, the Government announced that it had "decided to take forward proposals to enable Orders to provide for legislative sub-delegation". It said the Bill would require any explanatory document accompanying an Order that contained legislative sub-delegation provisions to "explicitly identify" the powers; and "give reasons for the conferral of those powers". The Government also announced that it would publish draft regulations alongside Orders as far as possible.[48]

### *h. Procedures and appropriateness*

The consultation document confirmed that "Parliament will always and should always remain the guardian of what is appropriate for delivery by RRO". Without making any recommendations the Government continued:

> Indeed, in debating the Bill proposals outlined in this consultation document, Parliament will help to define these limits. However, the Government is doubtful whether the mere size of a proposal should be a relevant factor, since it is quite possible to think of very small legislative changes that would be highly controversial, whether in the party political or the wider sense. It also questions

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46 Cabinet Office, *A Bill for Better Regulation Summary of Consultation Responses*, December 2005, p18
47 Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p19
48 Cabinet Office, *A Bill for Better Regulation Summary of Consultation Responses*, December 2005, pp19-20

> whether breadth of impact should be an issue if reforms are beneficial and consensus-driven. The aim of RROs should be to deliver beneficial reforms (large or small) as efficiently as possible. Elements of such proposals might touch on areas of some controversy in the wider sense as identified in the reports on the Civil Registration RRO – but effective consultation, appropriate safeguards and parliamentary scrutiny all act as guarantees of the appropriate use of these powers.
>
> The Government would like to hear from you:
>
> • What should be the limits to the reforms that could be delivered by this route?[49]

The consultation document also reiterated the Government's concerns about the two-stage super-affirmative procedure being used in the parliamentary scrutiny of all RROs, and, again without making any recommendations, asked:

> • Is it desirable that all RROs should receive the same level of scrutiny, regardless of size or complexity?
>
> • Is the super affirmative procedure necessary for all Orders, or could some be delivered by the faster procedures for ordinary statutory instruments?
>
> • If so, could you give examples of the type of proposal you would like to see delivered by the faster route?
>
> • If some proposals were delivered by faster procedures, how would the effectiveness of consultation and the protection of safeguards be maintained? Would it be enough for the explanatory statement laid with Orders to detail (as now) the results of consultation and any changes made as a result of it, and to analyse proposals against the current safeguards?[50]

It also asked whether it should be possible to amend private or hybrid legislation by order, and, if it became possible, whether additional safeguards would be required.

The Government reported that there was wide agreement that "highly controversial measures would not be suitable for delivery by Order" but added that there were questions about the definition of "controversial". As before the Government envisaged the current procedure would continue to identify controversial proposals.

Alison Seabeck asked the Minister "what consideration has been given to putting something explicit on the face of the new Bill to prevent it from being used for "large and controversial" measures?" Mr Murphy responded that:

> The sense is again to give that public assurance that the RRO process will not be used for highly controversial proposals. It is not our intention to put it on the face of the Bill but to give a similar commitment as we did in the passage of the 2001 Act.

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[49] Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p20
[50] Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p21

He considered that that approach had worked well in the case of the *Regulatory Reform Act* and he thought that the parliamentary committees were likely to have an enhanced role under the new provisions:

> There are safeguards already through this Committee and the Delegated Powers and Regulatory Reform Committee in the Lords. Those safeguards have stayed. It is a very easy argument to make that some of the safeguards are being enhanced. Obviously this Committee will retain its current powers as a minimum and I know through the Liaison Committee that there was a suggestion that the power of this Committee should be enhanced. In principle, that is something to which the Government is attracted, enhancing the role of this Committee to have a wider remit on the better regulation agenda as a whole. This morning I do not have a set of words to deliver to you on that, except an acknowledgment that we agree with the principle and we are happy to work with you and the Clerk of the Committee in conjunction with Cabinet Office officials to try to enable in a form of words that principle of an enhanced role for this Committee. [51]

Andrew Miller queried the changing lexicon the Minister had used: "Do we read anything into your use, Minister, of the word 'highly'? This seems to have crept into the dialogue. We had 'controversial' and now we have 'highly controversial'". Mr Murphy simply responded by saying "It is the words I chose to use. It is the words I have been using in discussion of the Bill. Whether my definition of highly controversial is the same as my predecessor's definition of controversial .... As you know, this Committee will ultimately make a decision as to how the various proposals are dealt with".[52]

Most respondents agreed that the scrutiny of orders should be more proportionate. However, some respondents "believed that ordinary affirmative or negative procedures for statutory instruments might not provide for adequate Parliamentary scrutiny for proposals amending primary legislation".

The Government outlined how it would move forward:

> In order to reflect the desire for more proportionate procedures whilst responding to concerns that ordinary negative or affirmative procedures might not be appropriate, the Government proposes that the RRC and DPRRC should each have the right to require that the most demanding procedure which either committee considers appropriate must be used. Ministers should be able to recommend what they consider to be the appropriate degree of scrutiny – super-affirmative, affirmative or negative – on a case by case basis. The Government considers that it is right that Parliament should retain the final say on which procedures are appropriate.
>
> As suggested by the RRC, proposals could be put to both Houses to remove the requirement for all Orders to go through two scrutiny stages, so that draft orders which the committees do not ask to be amended can simply be made at the end of the first scrutiny stage without delay. This would make the system more flexible

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[51] Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001 – uncorrected oral evidence (13 December 2005)*, 19 December 2005, HC 774-I 2005-06, Q23

[52] Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001 – uncorrected oral evidence (13 December 2005)*, 19 December 2005, HC 774-I 2005-06, Q24

> and encourage departments preparing Orders to produce high quality proposals and documentation, so that they get it right first time.
>
> Consultation responses indicated that it would remain inappropriate to deliver highly controversial measures by Order. In response to consultation, the Government has therefore reiterated its commitment not to use Order powers to deliver highly political measures, such as amendments to terrorism law or the Parliament Act, by Order.[53]

The Government concluded that orders should be able to amend some private legislation. It decided that local acts should be amendable but not personal ones. Ministers would have to consult those whose private interests were affected. Details of the consultation, responses and modifications to the proposals made as a result of representations would have to be included in the explanatory documents accompanying the order.[54]

Stephen Hammond asked about the process of deciding whether or not to use the super-affirmative resolution procedure in the consideration of orders made under the powers contained in the Bill. He asked how the decision would made "about whether we should have the full procedure or a shortened one". He also asked what evidence the Minister could provide that shortening the 60-day process or getting rid of it would add to the procedure, as he considered that "much more time is wasted outside of that in the pre-Parliament stage of getting things ready to be brought to this Committee than in the 60-days. The 60-days is the least important part of the procedure in terms of losing time".

Jim Murphy's response was:

> When we talk with business we talk about a risk-based regulatory regime which is proportionate. I think there is an acceptance we dinnae ken whether that is the right thing to do risk-based and proportionate. There is no sense that a one-size-fits-all parliamentary scrutiny of 60-days is either risk-based or proportionate.[55]

In its report on the Bill, the Regulatory Reform Committee also highlighted "risks involved in fast tracking".[56]

## B. Part 1 of the Bill: amending, repealing or replacing any legislation

In the Queen's Speech, at the beginning of the current session, the Government announced:

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53 Cabinet Office, *A Bill for Better Regulation Summary of Consultation Responses*, December 2005, pp22-23

54 Cabinet Office, *A Bill for Better Regulation – Summary of Consultation Responses*, December 2005, pp24-25

55 Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001 – uncorrected oral evidence (13 December 2005)*, 19 December 2005, HC 774-I 2005-06, Q66

56 Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 6 February 2006, HC 878 2005-06, para 64

> My Government is committed to promoting efficiency, productivity and value for money. Legislation will be introduced to streamline regulatory structures and make it simpler to remove outdated or unnecessary legislation.[57]

## 1. Order making powers

As indicated in the Government's commentary on the responses it received to its consutlation on *A Bill for Better Regulation*, the purpose of the order making power in Clause 1 of the Bill is drawn far wider than originally outlined. The Government's proposal in the consultation document was:

> The Government specifically proposes that RRO powers should be extended so that it is possible to amend or repeal primary legislation in order to do **one or more** of the following three things:
>
> - remove, reduce, re-enact or impose burdens (as now);
> - simplify legislation; and
> - implement uncontroversial Law Commission recommendations, including those that amend common law.[58]

However, Clause 1 (1) of the Bill simply states:

> A Minister of the Crown may by order make provisions for either of both of the following purposes –
> (a) reforming legislation
> (b) implementing recommendations of any one or more of the United Kingdom Law Commissions, with or without changes.

As presaged in the summary of responses to the consultation, the restriction that the order had to remove burdens has been removed.

The rest of Part 1 of the Bill outlines various conditions on the order making power and the procedures that Ministers have to follow in using the power.

Both Clause 1 and Clause 2 outline the extent of the power to amend legislation by order. Clause 1 defines "legislation" as:

> (a) any public general Act or local Act, or
>
> (b) any Order in Council, order, rules, regulations, scheme, warrant, byelaw or other subordinate instrument made under a public general Act or local Act,
>
> but does not include any instrument which is, or is made under, Northern Ireland legislation.

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[57] HC Deb 17 May 2005 c30
[58] Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p7

Clause 2 allows an order made under these provisions to amend **any** legislation; to sub-delegate powers; to amend, abolish or codify rules of law, in line with Law Commission recommendations; to make consequential changes; and to bind the Crown.

As indicated in the consultation period and by the Minister in his evidence to the regulatory reform committee, the existing "safeguards" have been amended and will apply to all orders made under the powers in the Bill. The conditions (or safeguards) are set out in Clause 3 (2):

> (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;
>
> (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.

The Explanatory Notes accompanying the Bill note that the Minister proposing the Order is the only person who has to be satisfied that the conditions have been met before he proceeds with his order:

> … there are five conditions which, where they are relevant, the Minister must consider are met before making an order.[59]

Under Clause 12, the Minister is required to set out why he considers that these conditions are met in the explanatory document that accompanies the order when it is laid before Parliament.

In addition to the conditions that have to be met before an order can be proposed, there are restrictions on what an order can be used to do. These are set out in clauses 4 to 7. In brief,

> (1) any sub-delegated power given by such an order can be exercised only by a statutory instrument that itself is subject to either the affirmative or negative procedure;
>
> (2) orders cannot impose or increase taxation;
>
> (3) orders cannot create offences or increase the penalty for offences that are punishable by imprisonment for more than two years, on indictment; or for 51

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[59] *Legislative and Regulatory Reform Bill 2005-06 – Explanatory Notes*, para 27

weeks, on summary conviction; or levy a fine exceeding level 5 on the standard scale; or

(4) orders cannot authorise forcible entry, search or seizure; or compel the giving of evidence.

Orders cannot be used in connection with matters within the legislative competence of the Scottish Parliament, except in implementing Law Commission recommendations, and if an order seeks to alter the functions of the National Assembly for Wales, it can do so only with the permission of the Assembly.

## 2. Consultation procedures

Before a Minister can propose an order, he has to consult interested bodies. Clause 11 (1) sets out who the Minister should consult with; although, if he is proposing to implement Law Commission recommendations, the obligation to consult these specific organisations is waived.

If the proposal is changed as a result of the initial consultation, a further consultation must be undertaken (Clause 11 (3)).

Proposals that were consulted on before the Bill is enacted, may be proceeded with under the Bill's powers, rather than existing powers (Clause 11 (4) and (5)).

Once the consultation is complete, and the Minister still considers an order is appropriate, he has to lay a draft order and explanatory document before Parliament. Clause 12 sets out the information that the explanatory document must contain. It also gives the parliamentary committees considering the draft order the right to ask for further information.

## 3. Parliamentary procedures

At present all regulatory reform orders are implemented under the super-affirmative procedure, which allows the Regulatory Reform Committee to consider the proposed order and suggest amendments to it and then reconsider the order before it gives a recommendation to the House on whether to approve the order. This process is mirrored in the House of Lords, where the Delegated Powers and Regulatory Reform Committee performs a similar function. However, clause 13 provides for the Minister proposing the order to recommend the procedure under which Parliament should consider the order. It allows the Minister to choose between:

(a) the negative resolution procedure;

(b) the affirmative resolution procedure; or

(c) the super-affirmative resolution procedure.

The reason for the choice must be explained in the explanatory document. If the Minister recommends either the negative or affirmative resolution procedure, both Houses are given 21 days to consider the recommendation. If either House requires that

a more stringent form of consideration is necessary then it is applied (Clause 13 (3) and (4)).[60]

The usual procedures for considering negative, affirmative and super-affirmative resolutions will apply. But changes to the Standing Orders would be required in relation to the 21-day period to consider a Minister's recommendation on the procedure to be followed. If the House delegates this task to a committee it will impose new responsibilities on the committee. It appears from press reports that the Government would like this approach to be adopted:

> The Government yesterday announced plans to create a new super select committee of MPs that will have the power to block the lawmaking efforts of all Whitehall departments.
>
> Under the Legislative and Regulatory Reform Bill, introduced yesterday, the little known regulatory reform committee will become the key parliamentary watchdog.
>
> The Bill proposes that departments be allowed to use statutory instruments, called regulatory reform orders, to make changes to "uncontroversial" regulations that impose burdens on business and government without the need for a vote in the House.
>
> Instead, the committee will act as the cross-party body that ensures any politically controversial changes are debated in full by MPs.
>
> Cabinet Office minister Jim Murphy commented that the committee, chaired by Andrew Miller, the Labour MP for Ellesmere and Neston, was "an important safeguard" to ensure the Bill's powers were not abused.
>
> "They are doing really important work, but, as the Government broadens its better regulation agenda and quickens the pace, it will have an impact on how the committee operates," he added.
>
> Mr Miller said the comments indicated the committee would have to become more powerful. "If we are to do the job of work envisaged in the Bill, then, to achieve that, we would have to have wider powers than we currently have," he said.[61]

Only under the super-affirmative order (Clause 16) would Committees have the power to make recommendations for amendments to the Government.

If the super-affirmative order making procedure is not used, the Government would not have the opportunity to make amendments to an order after it had been laid before

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[60] In the case of a Minister recommending the negative resolution procedure, either House can require either the affirmative or super-affirmative resolution procedure to be used. In the case of a Minister recommending the affirmative resolution procedure, either House can require the super-affirmative resolution procedure to be used.

[61] Richard Tyler, MPs ready to curb Whitehall powers Whitehall, *Daily Telegraph*, 12 January 2006

Parliament. The Regulatory Reform Committee also pointed out that the general public would have less opportunity to comment on any orders made in this way.[62]

In evidence to the Committee, the Minister emphasised that the Committee would have a role in determining whether an order was the appropriate way to implement a particular legislative change.[63] The Bill does not specify the procedures to be followed, should either Committee consider that it is not appropriate to use an order making power in a specific instance.

## 4. Potential uses of the powers

In his recent evidence to the Regulatory Reform Committee, Jim Murphy, the Cabinet Office Minister, outlined the process other departments were taking to simplify legislation and said that without a new Act it would not be possible to deliver these proposals:

> Departments are currently putting together the simplification plans in time for the next year's pre-Budget report. If we were put in a situation where we did not have a Bill in the first session, much of the ambitious simplification proposals that are coming out of departments would not have a tool to deliver. Based on the analysis of the 2001 Act, there would not have been an effective legislative tool to deliver those simplification proposals.[64]

Both the Department of Trade and Industry and the Department for Environment, Food and Rural Affairs have published draft simplification plans. These plans give an indication of the extent to which primary legislation could be amended by Order, if the Bill is enacted. The Department for Trade and Industry published *Better Regulation – Draft Simplification Plan* on 29 November 2005.[65] The Department for Environment, Food and Rural Affairs also published its plan in November 2005.[66]

Later, Mr Murphy gave some examples from departmental draft simplification plans:

> The departments are currently producing simplification proposals and I think people genuinely will be surprised by how ambitious they are when published, because there has been a real dialogue with stakeholders throughout the country. DTI and Defra I think have now published theirs. There is a specific list within those proposals. In terms of the specifics, within DTI, it is Consumer and Energy Law, the Construction Act, the Employment Law Requirements. Under Defra, the Environment Agency is proposing an Order which would reform the Radioactive Substances Act which would save £1 million a year. It would be anticipated that a

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62 Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001 – uncorrected oral evidence (13 December 2005)*, 19 December 2005, HC 774-I 2005-06, Q69

63 Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001 – uncorrected oral evidence (13 December 2005)*, 19 December 2005, HC 774-I 2005-06, Q23

64 Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001 – uncorrected oral evidence (13 December 2005)*, 19 December 2005, HC 774-i 2005-06, Q13

65 Department for Trade and Industry News Release, *DTI can cut red tape by £1 billion - help us do more*, 29 November 2005, http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=179587&NewsAreaID=2&NavigatedFromDepartment=False; and its plan is also on its website: http://www.dti.gov.uk/ewt/cutting_red_tape_plan.doc

66 Defra, *Lifting the burden – Defra Initial Regulatory Simplification Plan*, November 2005, http://www.defra.gov.uk/corporate/regulat/pdf/lifting-burden.pdf

> lot of the Law Commission recommendations could be delivered under this Bill, but I do not know if we are going to talk about the Law Commission report separately.[67]

When it considered the responses to the consultation process, the Government announced how it would limit its use of the powers:

> In response to consultation, the Government has therefore reiterated its commitment not to use Order powers to deliver highly political measures, such as amendments to terrorism law or the Parliament Act, by Order.[68]

However, the wording of Clause 2 (1) does not impose this restriction on the proposals that could be brought forward under the power.

## 5. Constitutional concerns

The Government confirmed that the *Regulatory Reform Act 2001* was "constitutionally ground breaking".[69] However, the powers in this Bill are far wider.

When the Regulatory Reform Committee took evidence from Jim Murphy on the review of the *Regulatory Reform Act 2001* and the consultation on the new Bill, the Committee expressed some surprise that the Bill was not being subjected to pre-legislative scrutiny. Citing the constitutional significance of the Bill, before it became apparent that the Bill would allow any legislation to be amended, Gordon Banks asked why the Bill would not be subjected to pre-legislative scrutiny. Jim Murphy said that "The Chancellor in the Budget earlier in the year committed us really to a pretty ambitious plan of delivery on better regulation".[70]

The duties of the Constitution Committee of the House of Lords are "to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution". In a letter to the Lord Chancellor and Secretary of State for Constitutional Affairs, Lord Holme, the Committee's chairman, expressed concerns that the Bill sought to confer "unprecedently wide powers" on Ministers. His letter is reproduced in Box 1.

The Regulatory Reform Committee has also examined the Government's proposals. It considered that the Bill "has the potential to be the most constitutionally significant Bill that has been brought before Parliament for some years". It issued a special report, "in view of the constitutional significance of Part 1 of the Bill … despite the short time between First and Second Reading". It commented that "there are few limits" to the

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67 Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001 – uncorrected oral evidence (13 December 2005)*, 19 December 2005, HC 774-i 2005-06, Q32

68 Cabinet Office, *A Bill for Better Regulation Summary of Consultation Responses*, December 2005, pp22-23

69 in the Review of the Act

70 Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001 – uncorrected oral evidence (13 December 2005)*, 19 December 2005, HC 774-I 2005-06, Q13

powers that the Bill gives to amend any legislation by order.[71] The Committee's summary is reproduced in Box 2, and its full list of recommendations is reproduced in Appendix 3.

**Box 1 – Letter from Lord Holme to the Lord Chancellor**

23 January 2006

**LEGISLATIVE AND REGULATORY REFORM BILL**

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.

HOLME OF CHELTENHAM

The Rt Hon the Lord Falconer of Thoroton
Lord Chancellor and Secretary of State for Constitutional Affairs

Source: Constitution Committee,
http://www.parliament.uk/documents/upload/Letter%20to%20Lord%20Chancellor%2023%2001%2006%20%28word%29.doc

[71] Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 6 February 2006, HC 878 2005-06, p3

**Box 2 – Regulatory Reform Committee's report on the Bill: Summary**

The Legislative and Regulatory Reform Bill [HC111], which is expected to have its Second Reading on 9 February, has the potential to be the most constitutionally significant Bill that has been brought before Parliament for some years. It needs to be scrutinised with particular care.

The Bill is promoted by the Cabinet Office as providing a means for Ministers to increase the pace of implementing the government's Better Regulation agenda. According to the Government, Part 1 of the Bill, which is the focus of this special report, seeks to tackle red tape and unnecessary regulations. This will be achieved by radically increasing the scope and power of the process of legislating by Order and by circumventing elements of the current parliamentary procedures. In broad terms, Part 1 of the Bill provides Ministers with a wide and general power to amend, repeal and replace all primary and secondary legislation, including legislation that may have been approved recently. There are few limits to this power. As with Regulatory Reform Orders (RROs), this power will be exercisable by means of Ministerial orders, but, it is now proposed that it will sometimes be subject to only negative resolution procedure. The Bill also provides Ministers with the power to change the common law by order.

Like the 2001 Regulatory Reform Act (RRA), which the Bill will replace, the Bill provides certain safeguards, but compared with the RRA, these safeguards and limits have generally been significantly reduced. For example, unlike under the RRA, the scope of the power will not be limited by a requirement on the Minister to identify "burdens" that will be removed or reduced. Also Ministers will not be prohibited from repealing, amending or replacing legislation that is less than two years old or from making orders that themselves subdelegate the power to legislate. As under the RRA, the orders will be scrutinised by parliamentary committees, which will probably be successor committees to the Regulatory Reform Committee (RRC) in the Commons and the Delegated Powers and Regulatory Reform Committee in the Lords. But compared with the current procedures, the Government is proposing a fast track procedure for some orders without including a converse power of the Committees to reject an order on the grounds that it is inappropriate for secondary legislation. It is expected that what safeguards are provided will be reinforced by Ministerial assurances. Overall, the proposed safeguards that are in the Bill are important, but in our view they are unlikely to provide sufficient counterbalance to the increased Ministerial powers that the Bill provides.

In view of the constitutional significance of Part 1 of the Bill, we have decided, despite the short time between First and Second Reading, to produce this report in order to report our views to the House in time for the Bill's Second Reading.

Source: Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 6 February 2006, HC 878 2005-06, p3

The Committee described the Bill as "essentially a law reform Bill", rather than a regulatory reform Bill.[72] And although the committee acknowledged that the Bill contained safeguards it said "these safeguards seem dwarfed when set against the increased powers that the Bill will provide to Ministers".[73]

The Procedure Committee has announced that it is to hold an evidence session on the Bill with Jim Murphy, on 7 February 2006. The terms of reference for the Committee's inquiry were published on 1 February 2006:

> The Committee's inquiry will examine whether the parliamentary procedures proposed in the Bill are appropriate for the extension to the powers which the Government is now proposing.[74]

## 6. Other reaction to the Bill

When the Bill was published on 11 January 2006, the Cabinet Office issued a press release, which again emphasised the regulatory reform aspects of the Bill, although it did confirm that regulatory reforms would be implemented by "creating a wider law reform power than the *Regulatory Reform Act 2001*".[75] The press release included some "stakeholder support" – all from business organisations: the CBI, the Federation of Small Businesses, the Institute of Directors, the British Chambers of Commerce and the Better Regulation Commission.[76] Their full comments are available on their own websites but the comments the Cabinet Office reprinted reflected those that Mo Mowlam cited when she introduced the *Regulatory Reform Bill* in 2001, for example:

| Reaction to the *Legislative and Regulatory Reform Bill* (2006) | Reaction to the *Regulatory Reform Bill* (2001) |
|---|---|
| | Mo Mowlam reported: |
| "This Bill is about putting in place the right machinery to help deliver the Government's reform plans and slash costly over-regulation. We welcome what it stands for, provided it is accompanied by the necessary culture change across Whitehall in order to fully deliver | For example, the Institute of Directors said that it is a<br><br>"good Bill . . . if it is used to its full potential, [it] should make a noticeable difference to the red tape burden". |

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72 Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 6 February 2006, HC 878 2005-06, para 3

73 Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 6 February 2006, HC 878 2005-06, para 4

74 Procedure Committee Press Notice No. 2, *Public Evidence Session – Legislative and Regulatory Reform Bill*, 1 February 2006, http://www.parliament.uk/parliamentary_committees/procedure_committee/proccom_06_02_leg.cfm

75 Cabinet Office News Release, *New Bill to enable delivery of swift and efficient regulatory reform to cut red tape – Jim Murphy*, CAB/001, 11 January 2006, http://www.cabinetoffice.gov.uk/regulation/news/2006/060111.asp

76 for example, CBI News Release, Business backs new bill to cut red tape but Government must act now on promises – CBI, 11 January 2006, http://www.cbi.org.uk/ndbs/press.nsf/0/e5ad0c9db7a25a0a802570f3003fd413?OpenDocument; British Chambers of Commerce, *Regulation Bill major step forward*, 11 January 2006, http://www.chamberonline.co.uk/YZ2mwH5oarMi4g.html

benefits and help businesses to focus more on innovation" – James Walsh, Institute of Directors Head of Regulation;

"The Better Regulation Bill is a key plank in the foundations of the Government's better regulation agenda, and the ability to deliver more regulatory reforms quickly and efficiently is good news for business. Crucially, the Bill seeks to bring about a lasting culture change in officials' attitudes to risk and regulation, which is the real prize for business" – John Cridland, CBI Deputy Director-General;

Digby Jones of the Confederation of British Industry said:

"The Bill has the potential of providing the tools to deliver real benefits to business".

"Regulatory burdens are amongst the main barriers to growth with which our members struggle. If this Bill can reduce them and free up their potential economic growth, unlike previous deregulatory attempts, this will be genuinely good news for the small business sector" – John Walker, Federation of Small Businesses National Policy Chairman

The Federation of Small Businesses believes

"that the Bill will be useful in helping to reduce the overall burden on business".

Cabinet Office Press Notice CAB/001

HC Deb 19 March 2001 c29

## C. The Role of the Courts

### 1. Judicial Review

Parliamentary sovereignty means that bills cannot be struck down by the courts. The concept of ultra vires does not apply to Acts of Parliament nor to parliamentary proceedings by virtue of Article 9 of the *Bill of Rights 1688*. There would thus be no mechanism by which the courts could review the parliamentary processes involved in Clause 1 of the Bill. However, statements made by ministers in Parliament in various forms are regularly used in judicial review proceedings to shed light on an administrative decision and its legality. The detailed requirements in Clause 12 and 13 of the Bill which relate to the draft order and explanatory document could possibly be used in this way.

A ministerial decision to abolish secondary legislation may be amenable to judicial review. The environmental campaign group Friends of the Earth recently applied for a judicial review of the Chancellor of the Exchequer's decision to abolish the Operating and Financial Review (OFR), after he appeared to reverse government policy following lobbying. The application for judicial review was made to the High Court on the grounds the decision was "procedurally unfair, irrational/perverse, a breach of legitimate expectation, and based upon material errors of fact".[77] Following this challenge, but prior to any court judgment or order, the decision was reversed:[78]

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[77] FOE website at: http://www.foe.co.uk/resource/press_releases/brown_faces_legal_chalenge_07122005.html

[78] The *Companies Act 1985 (Operating and Financial Review and Directors' Report etc.) Regulations 2005* SI No.1011 came into force 0n 22 March 2005

> The chancellor's abrupt retreat was triggered by an imminent legal action brought by Friends of the Earth, accusing Mr Brown of having acted unlawfully by abolishing the rules without proper consultation.
>
> The government has agreed to pay the environmental pressure group's legal costs under an out-of-court settlement.[79]

A public law concept which might be relevant is "legitimate expectation". According to the explanatory notes this idea can be compared to the test set out in Clause 3(2)(e) of the Bill:

> 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'.[80]

Generally, a legitimate expectation arises where a public authority has given an individual or a company an expectation that the authority will act in a particular way. This could be an expectation that a certain procedure will be followed or that a benefit will be forthcoming. The expectation can only be upset where there is an overriding public interest.

## 2. Human Rights

The courts have powers and obligations in respect of legislation contained in the *Human Rights Act 1998* (HRA). Liberty summarises these as follows:

> The HRA gives 'greater effect' to Convention Rights in two main ways:
>
> - It makes it clear that as far as possible the courts in this country should interpret the law in a way that is compatible with Convention rights.
> - It places an obligation on public authorities to act compatibly with Convention rights.
>
> The HRA also gives people the right to take court proceedings if they think that their Convention rights have been breached or are going to be.
>
> **Interpreting the Law Compatibly**
>
> Parliament makes laws but it is the courts that have to interpret them. The HRA makes it clear that when they are interpreting legislation the courts must do so in a way which does not lead to people's Convention rights being breached. Moreover, the courts are now under a duty to develop the common law - the law

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79 "Brown is accused of reporting rule U-turn *FoE wins right to consultation in new climbdown", *Financial Times*, 2 February 2006

80 Explanatory Notes: http://www.publications.parliament.uk/pa/cm200506/cmbills/111/en/06111x--.htm

> which has been developed through decisions of the courts themselves - in a way that is compatible with Convention rights.
>
> **What Happens if the Courts cannot Read the Law Compatibly?**
>
> If the law is an Act of Parliament, the courts have no choice but to apply the law as it is, even though it breaches Convention rights. However, the higher courts (the High Court, the Court of Appeal and the House of Lords) have the power to make what is called a 'declaration of incompatibility'. This is a statement that the courts consider that a particular law breaches Convention rights. It is meant to encourage Parliament to amend the law, but the courts cannot force the Government or Parliament to amend the law if they do not want to.
>
> (…)
>
> Where the courts find that an item of secondary legislation is incompatible with Convention rights, they have the power to strike the law down or not to apply it. This applies to all courts, not just the higher ones. The only circumstance where this is not possible is where the secondary legislation merely repeats a requirement of an Act of Parliament.[81]

# III The Hampton Review and Part 2 of the Bill

## A. Background to Hampton Review and its conclusions

In the 2004 Budget, Philip Hampton was commissioned to "consider the scope for reducing administrative burdens by promoting more efficient approaches to regulatory inspection and enforcement, without compromising regulatory standards or outcomes". His final report was published along with the 2005 Budget documents.[82]

In his letter accompanying the report to the Chancellor of the Exchequer, he commented that "The enforcement of regulations affects businesses at least as much as the policy of the regulation itself", and in the Executive Summary, he set out the aims of the review:

> The review's aim has been to identify ways in which the administrative burden of regulation on businesses can be reduced, while maintaining or improving regulatory outcomes.[83]

The Executive Summary also provided a summary of the Review's key findings and recommendations. The Review believed that it should be possible to achieve greater excellence in regulatory outcomes and that this could be done more efficiently, by:

- entrenching the principle of risk assessment throughout the regulatory system …;

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81 *The Liberty Guide to Human Rights*: http://www.yourrights.org.uk/your-rights/the-human-rights-act/workings-of-hra/how-does-the-hra-work.shtml

82 Philip Hampton, *Reducing administrative burdens: effective inspection and enforcement*, HM Treasury, March 2005, p1, http://www.hm-treasury.gov.uk/media/A63/EF/bud05hamptonv1.pdf

83 Philip Hampton, *Reducing administrative burdens: effective inspection and enforcement*, HM Treasury, March 2005, para 1

- … ensuring that inspection activity is better focused, reduced where possible but, if necessary, enhanced where there is good cause; …
- making much more use of advice…;
- substantially reducing the need for form filling … and other regulatory information requirements; and
- applying tougher and more consistent penalties where these are deserved.

It found strengths in the regulatory system, which it argued should be built on, including regulatory independence – a principle it strongly supported. It estimated that its proposals could lead to one million fewer inspections, a reduction of a third; and reduce by a quarter the number of forms regulators send out. Over time, its proposals had the potential to reduce the cost of regulation to Government and regulated sectors

Its principal recommendations were that:

• regulators should follow the principles of regulatory enforcement set out in Box E2 [see Box 3 below];

• risk assessment should be used comprehensively by every regulator; information requests, and penalties should also be based on risk assessment;

• regulators should use the resources released through full implementation of risk-based assessment to provide improved advice, because better advice leads to better regulatory outcomes, particularly in small businesses. Regulators should judge the effectiveness of their advice by monitoring business awareness and understanding of regulations; regulators should make on-site advice visits and tailored advice available to businesses;

• regulators should reduce the number of duplicated data requests and reduce the overall burden of forms by: involving business at all stages when introducing a new form, and business groups should vet the design of forms; when designing new forms, all regulators should include a statement detailing how long they will take to complete; and all regulators should keep a tally of how many forms they issue and set targets to reduce them;

• over the longer-term regulators should look to improve cooperation and data sharing to reduce the need for businesses to submit the same data more than once; no proposal for significant upgrades or enhancements to existing regulators' IT systems should go ahead without prior scrutiny by the proposed Better Regulation Executive;

• every Regulatory Impact Assessment should include, in addition to implementation on regulatory costs, an assessment of the practicality of enforcement;

• the penalty regime should be based on managing the risk of re-offending, and the impact of the offence, with a sliding scale of penalties that are quicker and easier to apply for most breaches with tougher penalties for rogue businesses which persistently break the rules;

• early warning before enforcement action should allow companies to correct problems before going to court, and therefore cut the administrative burden;

> • regulators should be structured around simple, thematic areas, in order to create fewer interfaces for businesses, to improve risk assessment and to reduce the amount of conflicting advice and information that businesses receive;
>
> • thirty one national regulatory bodies should be consolidated into seven, with individual regulators covering the entire scope of environment, health and safety, food standards, consumer and trading standards, animal health, agricultural inspections, and rural and countryside issues;
>
> • a new consumer and trading standards agency, incorporating the work of four existing regulators, should help coordinate local authority services to improve the use of risk-based inspection and consistency for businesses whilst maintaining national standards for consumers;
>
> • all regulators should ensure they have a performance management framework and systems in place to deliver fully risk based inspection, improved advice services and to monitor the impact of these changes on those they regulate;
>
> • the administration of all new policies and regulations should be based on the principles set out in this report, so new regulations are, where possible, implemented through existing inspection services and data collection channels; no new regulator should be set up if an existing regulator is able to carry out the task effectively;
>
> • the accountability of regulators for implementing the approach recommended in this report should be increased through for example suggesting enhanced Parliamentary scrutiny. This should not affect regulators' independence on individual regulatory decisions;
>
> • in place of the existing Regulatory Impact Unit, a new Better Regulation Executive, led by a senior business person, should be created in the Cabinet Office to drive through this reform programme.

In the consultation paper *A Bill for Better Regulation*, the Government said it had accepted all the recommendations in both the Hampton Review and the Better Regulation Task Force's *Regulation – Less is More*. The consultation considered the legislative measures necessary to implement the recommendations of these reviews. Chapter 2 considered the Hampton Review recommendations:

> The Government proposes to begin the legislative implementation of the Hampton report by:
>
> - updating the Enforcement Concordat around the Hampton principles of regulatory inspection and enforcement; and
>
> - taking a power to make structural changes to regulators. This will enable the Government to fulfil the Hampton recommendations around mergers, through which 31 national regulators are to be merged into seven, and give flexibility for the future to change regulatory structures as the business environment changes.
>
> The Government is also considering making the new Enforcement Concordat part of regulators' statutory duties and taking a power to amend regulatory penalty

regimes, to implement the outcome of the penalty review getting underway in the Better Regulation Executive (BRE).[84]

**Box 3 – Principles of inspection and enforcement** (Box E2 of the Hampton Review)

• Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most;

• Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take;

• All regulations should be written so that they are easily understood, easily implemented, and easily enforced, and all interested parties should be consulted when they are being drafted;

• No inspection should take place without a reason;

• Businesses should not have to give unnecessary information, nor give the same piece of information twice;

• The few businesses that persistently break regulations should be identified quickly, and face proportionate and meaningful sanctions;

• Regulators should provide authoritative, accessible advice easily and cheaply;

• When new policies are being developed, explicit consideration should be given to how they can be enforced using existing systems and data to minimise the administrative burden imposed;

• Regulators should be of the right size and scope, and no new regulator should be created where an existing one can do the work; and

• Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.

## B. The Enforcement Concordat

The Hampton Review recommended that the Better Regulation Executive (BRE), within the Cabinet Office, should have a duty to monitor regulators' compliance with the principles of inspection and enforcement which it set out.

In its consultation, the Government noted the similarities between the Hampton Review's principles of inspection and regulation (Hampton principles) and the Enforcement Concordat (a voluntary code of good practice to encourage business-friendly enforcement by local authorities). The Government commented that some of the Hampton principles "went further than the existing Enforcement Concordat". Because the Concordat was "popular with local authorities, is known in the business community, and is a useful single statement of regulatory practice … and to prevent two different sets of regulatory principles existing in parallel", the Government announced its intention to incorporate the Hampton principles into an updated Enforcement Concordat. The Government promised that the draft Concordat would be the subject of consultation. It also proposed that the new Concordat "should apply to all regulators covered by the Hampton review".[85]

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[84] Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p23

[85] Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, pp23-24

The Government also addressed whether the Enforcement Concordat should apply to other regulators and whether it should have a statutory basis:

> The Government would like to hear from you:
> • Do you agree that the Enforcement Concordat should be updated as described?
> • Should the Concordat apply to national as well as local regulators?
> • Should the Concordat be put on a statutory footing?[86]

The consultation revealed that:

> There was overwhelming support for updating the Concordat, and for its extension to national as well as local regulators. Opinions were more divided on whether the new Concordat should be statutory or not.[87]

In general business was in favour of the code being statutory whereas almost all regulators wanted a non-statutory code. As a result of the consultation, the Government decided:

> … to proceed with the updating of the Enforcement Concordat as outlined in the consultation document. Its view is that the new Concordat will apply to all regulators that were covered by the Hampton Report, but the detail of this will be considered further as the new Concordat develops. […] for the sake of future flexibility, [to] retain the power to make the Concordat statutory, as envisaged in the consultation document. In the light of the divided views expressed during the consultation, however, it has not yet decided whether to make the new Concordat statutory, or whether to trial the Concordat as a voluntary agreement.[88]

### 1. Implementing the Hampton principles for regulators: the Bill

Part 2 of the Bill concerns regulators: its origins lie in some of the Hampton Review's recommendations. It places a duty on regulators to adhere to certain principles in performing their duties; and allows Ministers to issue and revise a code of practice for which specified regulatory bodies would be subject to.

Clause 19 sets out the principles which regulators must adhere to in exercising their regulatory functions:

> (a) regulatory activities 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.[89]

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86 Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p26
87 Cabinet Office, *A Bill for Better Regulation – Summary of Consultation Responses*, December 2005, p26
88 Cabinet Office, *A Bill for Better Regulation – Summary of Consultation Responses*, December 2005, pp27-28
89 *Legislative and Regulatory Reform Bill 2005-06* clause 19 (2)

These principles are consistent with those enumerated in the Hampton Review (see Box 2), but not as comprehensive.

Clause 20 allows a Minister to issue or revise a code of practice which applies to regulators. Regulators must have regard to the code in exercising their regulatory functions. If they do not, it could affect the sanctions they impose. If a regulator has not complied with its duty to have regard to the code, a court or tribunal may take that into account in deciding how to deal with the failure of a person, regulated by the regulator, to comply with the requirement, restriction or condition imposed by the regulator.

Clause 21 sets out the procedures a Minister is required to follow in issuing or revising a code of practice for regulators. First, he must prepare a draft, consistent with the principles in Clause 19; and consult on a draft of the code. After consultation the Minister is required to lay a copy of the draft code of practice before Parliament. In a variant of the negative procedure, Parliament will then have 40 days to resolve not to approve the draft. If no such resolution is made, the Minister can issue the code in the same form and say when it comes into force.

Clause 22 would allow the Minister to specify by Order which regulatory functions the principles and code of practice applied to. There are some restrictions: ministers cannot specify functions relating to devolved matters in Scotland or Northern Ireland, nor to regulatory functions exercisable only in or as regards Wales – the National Assembly for Wales could do so under provisions in the clause; nor can the Minister specify the regulatory functions of a number of existing regulators.[90] Either the Minister or the National Assembly for Wales, when making such an order, has to consult with those whose functions are covered. Any such order would be subject to the affirmative resolution procedure in each House of Parliament.

Regulatory functions are defined in Clause 23.

## C. Simplifying the Regulatory Structure

The Hampton Review considered that a complex regulatory structure imposed administrative burdens on business and recommended the merger of a number of national regulators. In its consultation on the Bill, the Government said that it proposed:

> … to include a merger power in the Bill that will enable some of those mergers to be taken forward speedily. […]
>
> While these mergers could be accomplished through separate departmental Bills, the Government believes that it would be more coherent, more efficient and less wasteful of parliamentary time to take a general restructuring power over national regulatory bodies.[91]

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[90] The Bill lists: the Gas and Electricity Markets Authority (Ofgem), the Office of Communications (Ofcom), the Office of Rail Regulation (ORR), The Postal Services Commission (PostComm) or the Water Services Regulation Authority (Ofwat).

[91] Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p26

There was a limited response to questions on regulatory structures, but "a majority [of respondents] favoured the Government's proposals for a power to reform regulatory structures" with support for keeping the power general.

The Government confirmed that it was proceeding with the mergers recommended by the Hampton Review and that it would meet the April 2009 deadline for the completion of all mergers. It reported that a specific enabling power, to facilitate mergers (as envisaged in the consultation document), was not required:

> With the changes to Orders detailed above, Orders will be able to deliver the changes to regulatory structures for which the specific power was originally envisaged.[92]

The Bill contains no specific provisions that explicitly give Ministers powers to implement the mergers of regulators, as recommended by the Hampton Review. Ministers will be able to rely on the blanket powers to reform legislation in Part 1 of the Bill to implement the mergers.

## D. Penalty Regime

The Hampton Review recommended that the Better Regulation Executive "undertake a comprehensive review of regulators' penalty regimes, with the aim of making them more consistent". The review is scheduled to be completed in September 2006 but, in the consultation document, the Government anticipated that "many of its recommendations will need legislation". It continued:

> The Government is considering taking an enabling power in the Better Regulation Bill to reform regulatory penalty regimes through secondary legislation. This would give a route for penalties to be made more consistent across a range of regulations and for new types of penalty to be introduced where appropriate. The powers would only be used where existing powers in other Acts are insufficient.
>
> The Government would use such a power specifically to make penalty regimes within and between regulators more coherent, perhaps through use of a tariff, or by creating alternative penalty routes (such as administrative fines or restorative justice Orders) for particular instances of non-compliance with regulations. The power would not be used to impose new regulatory obligations.
>
> The sorts of measures that might be passed using such an Order would be:
> • changes to the fine level for a particular offence, to bring it into line with a related offence;
> • addition of alternative penalties, such as restorative penalties, to a particular regulation;
> • provision of an administrative fine regime for particular cases of non-compliance with regulations.
>
> The Government intends that the process for preparing and scrutinising an Order would be similar to that used for Regulatory Reform Orders. This would ensure

[92] Cabinet Office, *A Bill for Better Regulation – Summary of Consultation Responses*, December 2005, p29

> that all proposals would be subject to proper scrutiny. The power could be limited to proposals arising from the penalty review (perhaps through a time limit), or could be more general.[93]

In its report on the responses to the consultation, the Government confirmed that the review of regulators' penalty regimes, led by Professor Richard Macrory, was underway. However, as few respondents commented on this aspect of the consultation, the Government "decided not to pursue a penalty reform power until after the outcome of the Macrory Review in Autumn 2006".[94]

# IV Legislation relating to the European Communities etc. – Part 3

Part 3 of the *Legislative and Regulatory Reform Bill* comprises some provisions that were included, in slightly different form, in both the *European Union Bill 2004-05* and *European Union Bill 2005-06* – the Bill making "provision in connection with the Treaty signed at Rome on 29th October 2004 establishing a Constitution for Europe; and to require a referendum to be held about it".[95] It brings forward measures to allow technical amendments made to European Community legislation to come into effect automatically in the UK without the need to amend domestic regulations made to implement the original European legislation.

In the explanatory notes accompanying the *Legislative and Regulatory Reform Bill*, the Government commented:

> 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.[96]

Clause 24 (1) and (2) amends the *Interpretation Act 1978* so that, after the *Legislative and Regulatory Reform Bill* comes into force, a reference to a "Community instrument", in any legislation, will be taken as a reference to the instrument "as so amended, extended or applied". This change will also apply to Northern Ireland legislation and Acts of the Scottish Parliament.

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93 Cabinet Office, *A Bill for Better Regulation: Consultation Document*, July 2005, p28

94 Cabinet Office, *A Bill for Better Regulation – Summary of Consultation Responses*, December 2005, p30, http://www.cabinetoffice.gov.uk/regulation/documents/pdf/consultation_responses.pdf

95 *European Union Bill 2005-06* [Bill 5 of 2005-06]

96 *Legislative and Regulatory Reform Bill – Explanatory Notes*, January 2006, para 8

Clause 25 adds definitions of the "EEA agreement" and "EEA state" to the *Interpretation Act 1978*, and makes a similar change, with savings, for Scotland.

The provisions included in Clauses 24 and 25 were among the definitional changes included in Schedule 1, Part 2 of the *European Union Bill 2005-06*.

Section 2 of the *European Communities Act 1972* allows Ministers to make regulations to implement Community obligations in the United Kingdom. Clause 26 would additionally grant Ministers the power to make orders, rules or schemes to implement Community obligations (Box 3 outlines the differences between these forms of delegated legislation). The Explanatory Notes to the *European Union Bill 2005-06* commented that this addition is designed to "allow section 2(2) to be used in combination with delegated powers in other legislation which allow for orders, rules and schemes".[97] For example, the power under Section 15 of the *Fisheries Act 1981* is the power to make a "scheme". It is possible that the inclusion of "scheme" will help avoid complications in the future.

Subsection 5 gives Ministers powers to amend regulations that have already been made under the section 2 of the *European Communities Act 1972*, so that they can include references to orders, rules or schemes – that is the power to sub-delegate is also broadened. Again this power is made available to devolved administration. The power to do this is exercisable by statutory instrument (or statutory rule in Northern Ireland). Such statutory instruments, made by a Minister of the Crown, would be subject to the negative procedure in Parliament.

**Box 4 – Regulations, orders, rules and schemes**

In 1932 the use of the terms 'regulation', 'rule' and 'order' was the subject of a recommendation in the Report of the Committee on Ministers' Powers (Cmd 4060, page 64) – 'the Donoughmore Committee' – as follows:

> The expressions 'regulation' 'rule' and 'order' should not be used indiscriminately in statutes to describe the instruments by which law-making power conferred on Ministers by Parliament is exercised. The expression 'regulation' should be used to describe the instrument by which the power to make substantive law is exercised, and the expression 'rule' to describe the instrument by which the power to make law about procedure is exercised. The expression 'order' should be used to describe the instrument of the exercise of (A) executive power, (B) the power to take judicial and quasi-judicial decisions.

This recommendation has generally been followed in enabling Acts passed since the Report, but there is not always a clear-cut distinction between the three types of instrument. The term 'orders' is sometimes used in a wider sense to mean legislative instruments other than Acts, as in the official Table of Government Orders.

Source: Cabinet Office, *Statutory Instrument Practice*, 3rd edition, June 2003

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[97] *European Union Bill 2005-06 – Explanatory Notes*, May 2005, para 48

Clause 27 would allow references to Community instruments in subordinate legislation to be taken as a reference to an amended version of the Community instrument, so UK implementing legislation will be able to pick up future amendments to the Community instrument, without further subordinate legislation being required. This provision was included in Schedule 2 of the *European Union Bill*, under the heading "References to future modifications of EU instruments". It is aimed at the situation where a Community instrument will be the subject of subsequent technical amendments. The Explanatory Notes explain why the Government consider the changes to be necessary and how the provision will operate in practice:

> … Such provision can only be made where it appears to the person making the legislation that it is necessary or expedient for references to Community instruments in the legislation he is making to have that ambulatory meaning.
>
> The reason for this amendment is that it might otherwise be thought that such ambulatory references could not be made. An example of when this power might be useful is where a Community instrument contains lists or tables of technical detail which might be the subject of frequent updating or amendment. A person making legislation which refers to such an instrument could make use of this power in order to avoid the need for the legislation to have to be amended regularly in the future simply to reflect the updating of the Community instrument.[98]

## 1. Legislative Consent Memorandum (Sewel Convention)

The Scottish Executive has tabled a Legislative Consent Memorandum in connection with the *Legislative and Regulatory Reform Bill*. The process (the Sewel Convention) applies when the UK Parliament legislates on a matter which is devolved to the Scottish Parliament. It holds that this will happen only if the Scottish Parliament has given its consent. In the case of the *Legislative and Regulatory Reform Bill*, only Part 3 of the Bill is covered by the Legislative Consent Memorandum:

> 1. The draft motion, which will be lodged by the Minister for Finance and Public Service Reform, is:
>
> > That the Parliament agrees that the relevant provisions in the Legislative and Regulatory Reform Bill introduced to the House of Commons on 11 January 2006, that relate to the implementation of European Union obligations and which are within the legislative competence of the Scottish Parliament, or which confer executive powers on the Scottish Ministers, should be considered by the UK Parliament.[99]

Further details on the Sewel Convention are provided in a Library Standard Note.[100]

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98 *Legislative and Regulatory Reform Bill – Explanatory Notes*, January 2006, paras 87-88

99 Scottish Executive, *Legislative Consent Memorandum – Legislative and Regulatory Reform Bill*, January 2006, http://www.scottish.parliament.uk/business/legConMem/pdf/LegRegRefLcm.pdf

100 House of Commons Library Standard Note SN/PC/2084, *The Sewel Convention*, 25 November 2005, http://www.parliament.uk/commons/lib/research/notes/snpc-02084.pdf

# V The development of regulatory reform procedure

## A. The legal basis of the order making power

The *Deregulation and Contracting Out Act 1994* (DCOA) provided a means to remove unnecessary statutory burdens on business, voluntary organisations and charities or individuals. Sections 1 to 4 of that Act set out an order-making power which allowed primary legislation passed prior to October 1994[101] to be amended through the use of secondary legislation.

The *Regulatory Reform Bill [HL] 2000-01* is considered by the Government to be a key part of its regulatory reform agenda. According to the Cabinet Office, the Bill is necessary because there is a significant amount of legislation that is unnecessarily burdensome for businesses. It would be possible to improve the regulatory environment by reforming the legislation. However, the existing deregulation order-making power under the DCOA is not wide enough; the only other avenue for reform is through primary legislation and this takes time.[102]

### 1. The Deregulation and Contracting Out Act 1994

In 1994, a new procedure was introduced to amend primary legislation by means of statutory instruments. Section 1 of the *Deregulation and Contracting Out Act 1994*, was entitled 'Power to remove or reduce certain statutory burdens on businesses, individuals etc'.[103] The Act's long title began:

> An Act to amend, and make provision for the amendment of, statutory provisions and rules of law in order to remove or reduce certain burdens affecting persons in the carrying on of trades, businesses or professions or otherwise, and for other deregulatory purposes …[104]

Although concerns were expressed in the 1980s about the costs imposed on businesses in complying with Government regulations, the *Deregulation and Contracting Out Act 1994* can trace its origins back to John Major's speech to the Conservative Party Conference in October 1992. In that speech he called on Michael Heseltine, then Secretary of State for Trade and Industry, to take responsibility for cutting through the "burgeoning maze of regulations":

> Who better for hacking back the jungle? Come on, Michael. Out with your club. On with your loin cloth. Swing into action!

Deregulation orders were introduced, under the *Deregulation and Contracting Out Act 1994*, to amend or repeal, by order, existing legislation that imposed burdens on business:

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[101] It can also be applied to primary legislation passed after 1994 if it is consolidating earlier legislation.

[102] House of Commons Library Research Paper 01/27, *The* Regulatory Reform Bill [HL]*: order-making power and parliamentary aspects – Bill 51 of 2000-01*, 14 March 2001 (revised edition), http://www.parliament.uk/commons/lib/research/rp2001/rp01-027.pdf

[103] The *Deregulation and Contracting Out Act 1994* (chapter 40)

[104] *Ibid*

> If, with respect to any provision made by an enactment, a Minister of the Crown is of the opinion—
>
> (a) that the effect of the provision is such as to impose, or authorise or require the imposition of, a burden affecting any person in the carrying on of any trade, business or profession or otherwise, and
>
> (b) that, by amending or repealing the enactment concerned and, where appropriate, by making such other provision as is referred to in subsection (4)(a) below, it would be possible, without removing any necessary protection, to remove or reduce the burden or, as the case may be, the authorisation or requirement by virtue of which the burden may be imposed,
>
> he may, subject to the following provisions of this section and sections 2 to 4 below, by order amend or repeal that enactment.[105]

The Act introduced a process for Parliamentary consideration of such orders, and on 2 March 1995, the House nominated the first members of the Deregulation Committee. The Committee's tasks were set out in the House's Standing Orders:

> … to examine every document containing proposals laid before the House under section 3, and every draft order proposed to be made under section 1, of the Deregulation and Contracting Out Act 1994.[106]

Similarly, the House of Lords established the Delegated Powers and Deregulation Committee. Both committees regularly reported on the operation of the DCOA.[107]

## 2. Regulatory Reform Act

In March 1999, the Government announced plans to extend the provisions in the *Deregulation and Contracting Out Act 1994*. After some consultations, the Government published the draft Regulatory Reform Bill. Both Committees considered the draft Bill, separately, and were broadly supportive:

> The Regulatory Reform Bill was published in draft in April 2000, after a lengthy period of informal consultation between the Cabinet Office and the two Deregulation Committees. We produced a formal report on the draft Bill in May 2000, and commented further on the Government's observations on that Report in July. Like our sister committee in the Lords, we were generally welcoming of the draft Bill's expansion of the scope of deregulation and regulatory reform, but both Committees had reservations about some of the detail, not all of it minor in nature. Nonetheless, the Bill finally introduced in the Lords in December was identical to the draft Bill which we had considered during the formal pre-legislative process.[108]

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105 *Deregulation and Contracting Out Act 1994* (chapter 40) s1

106 House of Commons, *Standing Orders for Public Business*, Standing Order No 141 (1)

107 for example, Deregulation Committee, *the Future of the Deregulation Procedure*, 22 April 1999, HC 324 1998-99; Delegated Powers and Deregulation Committee, *Special Report*, 20 November 1998, HL 158 1997-98

108 Deregulation Committee, *The Handling of Regulatory Reform Orders*, 16 March 2001, HC 328 2000-01, para 5

The *Regulatory Reform Act* came into force on 10 April 2001. The Act extended the scope and application of deregulation orders, which could be made under the *Deregulation and Contracting Out Act 1994*, and introduced a new type of order – regulatory reform orders. The House's Standing Orders were amended to reflect these changes and the Deregulation Committee was renamed the Deregulation and Regulatory Reform Committee. A further amendment, once all outstanding Deregulation Orders had been made, saw the name change again to the Regulatory Reform Committee.

In introducing the second reading debate on the *Regulatory Reform Bill 2000-01*, Mo Mowlam, the Minister for the Cabinet Office, told the House why some regulation was necessary and outlined how the Government sought to strike the right balance between protecting society and cutting bureaucracy:

> All Governments regulate to protect consumers, the environment, employers, employees, and society as a whole. The Government were elected on principles of fairness, justice and equality of opportunity, and those are the principles that we have put into practice in introducing fair and effective regulation. That is not about red tape or petty bureaucracy. The Government have no need to apologise for legislating for decent holiday entitlement, safety in the workplace, or policies to make work pay, such as the working families tax credit and the minimum wage. Those are commitments that we made in our manifesto, and they are commitments that we have honoured.
>
> […]
>
> As so often in politics, it is essential to strike the right balance. No one wants unnecessary, over-complicated and burdensome regulation. We have taken active steps to ensure that what regulations are introduced are necessary, simple, and easy to understand and implement. I chair a panel on regulatory accountability whose key task is to scrutinise Departments' regulatory proposals and ensure that they meet that high standard. I call Ministers to come to the panel and justify their proposals if the panel thinks that they do not meet its criteria.
>
> In the Cabinet Office, the regulatory impact unit operates across government to ensure that Departments make a thorough appraisal of the costs and benefits of any new proposals or regulations, and to suggest changes and improvements wherever it can. Departments now have to produce regulatory impact assessments across the board. The Government are aided in that by two powerful advocates at the heart of government. The Small Business Service, set up in April last year, is headed by David Irwin and includes an independent council of outside experts to advise on the specific needs of small firms. The better regulation taskforce, headed by Lord Haskins, was set up in September 1997. Its members are drawn from a wide range of backgrounds, including business, consumer organisations and trade unions. Each organisation can voice concerns about regulation and seek improvement. It would be fair to say that Lord Haskins, in particular, has not shied away from making public some constructive criticisms when he thought it necessary.[109]

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[109] HC Deb 19 March 2001 cc22-24

She argued that the Bill was "another tool to help the Government simplify and improve the quality of regulation", which was "designed to build on and improve the Deregulation and Contracting Out Act 1994, passed by the previous Government".[110]

She also argued that because the Government had not extensively used the *Deregulation and Contracting Out Act 1994*, it demonstrated that "there is a need to reform the 1994 Act, to extend its powers and to make it clear, so that it can be used more often". She continued:

> **…** we needed to change the 1994 Act to make it workable. We are using it as a basis for the Bill. We need to update the Act because, among other things, its powers are limited to pre-1994 legislation; it cannot remove burdens from the public sector; it does not allow subsequent amendment of deregulation orders, which limits its scope; and it defines regulatory burdens too narrowly.[111]

She told the House that the Government had provided a list of 50 measures that could be taken forward by the orders that would be available under the Bill.[112] In fact, by July 2005, a total of 27 regulatory reform orders had been made.[113] She also outlined support that had been received from a number of industry organisations for the provisions in the Bill (see section I B 6).[114]

The Conservative Party tabled a reasoned amendment because of their concerns that the Bill went beyond the scope of deregulation:

> **Mr. Andrew Lansley (South Cambridgeshire):** I beg to move, To leave out from "That" to the end of the Question, and to add instead thereof:
>
> > "this House declines to give a Second Reading to the Regulatory Reform Bill *[Lords]* because it seeks to extend the use of powers intended solely for a deregulatory purpose to the creation of new burdens and to the rewriting of legislation without a specific deregulatory effect; and fails to apply sufficient consultative, scrutiny and review provisions to the exceptional powers proposed." [115]

## 3. Legal safeguards

Both Acts placed conditions on Ministers and central to both was the requirement to remove regulatory burdens. The relevant provisions in the Regulatory Reform Act 2001 are:

> **2 Meaning of "burden" and related expressions**
>
> (1) In this Act "burden" includes-

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[110] HC Deb 19 March 2001 c24
[111] HC Deb 19 March 2001 c25
[112] HC Deb 19 March 2001 c26
[113] Cabinet Office, *Review of the Regulatory Reform Act 2001*, July 2005, p6
[114] HC Deb 19 March 2001 c29
[115] HC Deb 19 March 2001 c30

(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
(b) any limit on the statutory powers of any person (including a limit preventing the charging of fees or the incurring of expenditure),
but does not include any burden which affects only a Minister of the Crown or government department.

(2) In this Act-
(a) any reference to creating or imposing a burden includes a reference to authorising or requiring a burden to be created or imposed,
(b) any reference to removing a burden includes a reference to removing the authorisation or requirement by virtue of which a burden may be imposed, and
(c) any reference to reducing a burden includes a reference to reducing the authorisation or requirement by virtue of which a burden may be imposed (for example, by restricting the circumstances in which it is authorised or required to be imposed).

**3 Limitations on order-making power**

(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-
(a) remove any necessary protection, or
(b) prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise.

(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-
(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
(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.

(3) If an order under section 1 creates a new criminal offence, then, subject to subsection (4), that offence shall not be punishable-
(a) on indictment with imprisonment for a term exceeding two years, or
(b) on summary conviction with imprisonment for a term exceeding six months or a fine exceeding level 5 on the standard scale.

(4) In the case of an offence which, if committed by an adult, is triable either on indictment or summarily and is not an offence triable on indictment only by virtue of-
(a) Part V of the Criminal Justice Act 1988 (c. 33), or
(b) section 292(6) and (7) of the Criminal Procedure (Scotland) Act 1995 (c. 46),
the reference in subsection (3)(b) to level 5 on the standard scale is to be construed as a reference to the statutory maximum.

(5) An order under section 1 shall not contain any provision-
(a) providing for any forcible entry, search or seizure, or
(b) compelling the giving of evidence,
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.[116]

## B. Parliamentary procedure

Robert Blackburn and Andrew Kennon describe the regulatory reform procedure thus:

> The procedure for the making of an order under the *Regulatory Reform Act* (as for orders under the *Deregulation and Contracting Out Act* before it) involves consideration by the Regulatory Reform (Select) Committee in the House of Commons and the Delegated Powers and Regulatory Reform Committee in the House of Lords. The committees' consideration is a two-stage process, looking first at the proposal and later at the order itself. Unlike other statutory instruments, these draft orders are not considered by the Joint or Select Committee on Statutory Instruments. Furthermore, the Regulatory Reform Committee's scrutiny includes matters touching upon the merits of the proposals as well as more detailed drafting points. The Committee recommends that the draft order be made, that it be amended or that it should not be made. The next stage is for the minister to lay the statutory instrument. Since it requires the approval of the House, such an instrument is laid in the form of a draft. The committee then examines it again and considers the extent to which the minister has taken into account representations from the committee and others at the earlier stage. If the committee then agrees unanimously that the order be made, it can be taken on the floor of the House without debate. If the committee supports it, but with a dissenting minority who vote against it, the instrument can only put to the vote in the House after a debate of up to 90 minutes. If the committee recommends against approval of the order, the government can only get its way by pressing the issue in a three-hour debate in the House. In practice, the Deregulation Committee failed to approve six proposals and the government did not proceed with any of them. Thus the fallback procedure for debates on the floor of the House has not yet been invoked.[117]

## C. Initial views on the regulatory reform process

Following the passing of the *Regulatory Reform Act 2001*, the Deregulation Committee commented on the process of considering proposals and draft orders under the new Act.

In its report on the final deregulation orders, laid in accordance with the provisions of the *Deregulation and Contracting Out Act 1994*, the Deregulation Committee noted that three proposals for regulatory reform orders had been laid at the same time. The Committee commented that under the deregulation procedure, a convention developed, that "as far as possible no more than one proposal or draft Order would be laid before Parliament in any one week", to allow the Deregulation Committee and its counterpart in the Lords to cope with the flow of business. Because it anticipated proposals of considerably wider breadth and greater complexity, it expected the Government "to aim towards an even flow of regulatory reform business and so far as possible towards the

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[116] *Regulatory Reform Act 2001* (chapter 6), sections 2 and 3

[117] Robert Blackburn and Andrew Kennon, *Griffith and Ryle on Parliament: Functions, Practice and Procedures*, 2nd edition, 2003, pp349-350

objective that no more than one proposal for a Regulatory Reform Order or one draft Order will in normal circumstances be laid before Parliament in any one sitting week".[118]

The Committee also expected the Government to provide a monthly report of progress on "proposals planned, in the consultation stage, or laid before Parliament with target dates for the completion of each stage".[119]

Finally the Committee expressed concerns that the distinction between the need for primary legislation and the use of regulatory reform orders could become blurred:

> While all concerned in the deregulation business (this Committee included) have routinely congratulated each other on the superior quality of scrutiny achieved under the new procedure, it nonetheless remains a fundamental principle of the system in its revised form, as in its original form, that the procedure should not be used for implementing substantial policy changes requiring the much higher-profile attention paid by Parliament to primary legislation. It is vital that that distinction should remain, and that Departments should not be enabled to circumvent the intentions of Parliament by a form of primary legislation by stealth. The Committees of both Houses will need to be particularly vigilant when the anticipated stream of regulatory reform proposals begins to flow in the next Parliament.[120]

The Government's response to the overarching issues raised in the Deregulation Committee's final report was published in November 2001. The Government acknowledged that the views in the response were "prospective".[121]

The Government agreed that "order-making should be conducted in a transparent and planned manner". It also considered that "it is vital to the success of the regulatory reform order-making programme that there is a shared understanding as to the extent of the powers and safeguards in the new Act".[122]

However, even before the procedure had been much used, the Government had expressed some concerns about how it would operate:

> One concern that we have for future order-making is the prospect of abortive work, particularly in view of the heavily front-loaded nature of the regulatory reform order-making process and of the scale of some of the RRO proposals. There is the risk of misunderstandings or the prospect that the Committees might consider particular technical solutions underpinning large orders to be flawed and that these may only come to light after a proposal has been laid for scrutiny.[123]

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[118] Deregulation Committee, *The Final Deregulation Proposals*, 11 May 2001, HC 450 2000-01, para 2
[119] Deregulation Committee, *The Final Deregulation Proposals*, 11 May 2001, HC 450 2000-01, para 3
[120] Deregulation Committee, *The Final Deregulation Proposals*, 11 May 2001, HC 450 2000-01, para 8
[121] Deregulation and Regulatory Reform Committee, *Further Report on the Handling of Regulatory Reform Orders*, 28 November 2001, HC 389 2001-02, Appendix, para 3
[122] Deregulation and Regulatory Reform Committee, *Further Report on the Handling of Regulatory Reform Orders*, 28 November 2001, HC 389 2001-02, Appendix, para 4
[123] Deregulation and Regulatory Reform Committee, *Further Report on the Handling of Regulatory Reform Orders*, 28 November 2001, HC 389 2001-02, Appendix, para 6

The Government also expressed concern that the Committee's suggested limit of no more than one proposal or draft being laid each sitting week would limit it to "an expected maximum completion rate of only 18 RROs made per session".[124]

The Government offered to provide three reports between the main parliamentary recesses, rather than monthly reports on the progress of orders.[125]

In response to the Committee's concerns about using the regulatory reform order procedure in inappropriate circumstances, the Government raised a number of points. The Committee's comment that "the Act should not be used 'for implementing substantial policy changes requiring the much higher-profile attention paid by Parliament to primary legislation'", prompted the following response:

> This has caused us some difficulty — and may be open to mis-interpretation. One interpretation could be that the order-making process is inappropriate for implementing any substantial policy change as that is what bills are for. Another interpretation could be that it is inappropriate only for those substantial policy proposals that, by both their controversial nature and scale, require a Bill.
>
> The Government hopes that the former is not the Committee's intention. This is because the Act does not limit the order-making power in relation to substantial policy changes, and the Government is concerned to ensure that the Committee should not construe the Act too restrictively. It notes that every deregulation order, however minor, reflected a change in policy and implemented that change.[126]

The Government pointed out that "The level of attention paid to such proposals is certainly no less than primary legislation receives". While it agreed that primary legislation tended to be of "higher profile", it considered that the super-affirmative procedure was "well-suited to the objective consideration of complex issues", and that many such examples were cited during the passage of the Bill". It concluded that:

> The Government is happy to repeat its commitment not to implement measures that are both large **and** controversial using the power in the Act.[127]

# D. Reviewing the regulatory reform process

## 1. Introduction

Since the initial exchange of views between the Government and the Regulatory Reform Committee soon after the *Regulatory Reform Act 2001* came into force, the Committee has continued to review the regulatory reform process, take evidence from ministers and

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[124] Deregulation and Regulatory Reform Committee, *Further Report on the Handling of Regulatory Reform Orders*, 28 November 2001, HC 389 2001-02, Appendix, para 9

[125] Deregulation and Regulatory Reform Committee, *Further Report on the Handling of Regulatory Reform Orders*, 28 November 2001, HC 389 2001-02, Appendix, para 19

[126] Deregulation and Regulatory Reform Committee, *Further Report on the Handling of Regulatory Reform Orders*, 28 November 2001, HC 389 2001-02, Appendix, paras 24-26

[127] Deregulation and Regulatory Reform Committee, *Further Report on the Handling of Regulatory Reform Orders*, 28 November 2001, HC 389 2001-02, Appendix, paras 30-34

officials, and react to the Government's responses. In addition, during the passage of the Act, through Parliament, the Government committed itself to a review of the Act, after three years.

A number of issues that arose during this ongoing review process have been resolved by the Government and the Committee but others either emerged as the process developed or were never resolved to the satisfaction of the Government in the period between 2001 and 2005.

The Government's formal review was delayed: in evidence to the Committee in July 2003, Douglas Alexander, the Cabinet Office minister, said that "next April will probably be too soon to start a full review of the workings of the Act". The Committee agreed with the Government that "at this stage, insufficient use has been made of the 2001 Act to enable meaningful conclusions to be reached on the efficacy of the regulatory reform procedure. We support the Government's emphasis on 'putting a foot on the accelerator' and urge it to focus on directing available resources towards progressing the regulatory reform programme" but called on the Government to give an undertaking to the House about when the full review would take place.[128]

In place of the full review of the Act in 2004, the Government undertook a "partial review", which was submitted to the Committee.

In June 2005, the Government published its formal review of the Act. That review and subsequent developments were discussed in section II of this paper.

### 2. Partial review

The Regulatory Reform Committee's third regular review of the *Operation of the Regulatory Reform Act 2001* was published in January 2005.[129] It covered the period July 2003 to the start of January 2005.

The Committee reported on a memorandum it received from the Cabinet Office which highlighted the issues raised by the abbreviated three-year review of the Act and an oral evidence session with Ruth Kelly, who, by the time the Committee reported, had left the Cabinet Office.

In its opening paragraph, the Committee provided its view of the usefulness of and its concern about the under-utilisation of regulatory reform orders:

> RROs provide the Government with an effective vehicle for reforming primary legislation where redundant regulation needs removing or regulatory provisions need to be re-focussed. Despite their attractions, the true potential of RROs has

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[128] Regulatory Reform Committee, *The Operation of the Regulatory Reform Act 2001: a progress report*, 5 November 2003, HC 908 2002-03, para 60

[129] Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001*, 31 January 2005, HC 273 2004-05

> not yet been fully realised, not least because the process seems to be poorly understood across many Government Departments.[130]

The Committee also commented on the progress the Government was making in meeting its targets:

> Despite persistently missing its target for the number of RROs, the Cabinet Office was confidently claiming, even in March 2004, that it was "on course" to reach its target of 60 by 2005.[131]

In its report on the *Legislative and Regulatory Reform Bill*, the Committee again examined the reasons for the limited use of the regulatory reform order procedure and the reasons for the delays in implementing orders when the powers are used.

It commented that "the number of orders made has consistently fallen below the Government's own targets",[132] and presented the following table:

**RRO performance against successive PSA targets**

| Financial year ending | Target announced | Number of RROs | |
|---|---|---|---|
| | | Annual total | Cumulative total |
| 2001 | 40 (by end of 2003 calendar year) | 1 | 1 |
| 2002 | 60 ("by end of 2005") | 7 | 8 |
| 2003 | 60 ("by end of 2005") | 8 | 16 |
| 2004 | 75 ("by March 2008") | 4 | 20 |
| 2005 | 75 ("by March 2008") | 7 | 27 |

The Committee tabulated the length of time spent on each stage of a regulatory reform order for each order that has been made. It concluded that "relatively little time of each RRO is spent undergoing Parliamentary scrutiny compared with the time spent within departments".[133]

The Committee devoted the majority its January 2005 report to the Government's "so-called limited review undertaken in 2004 [which] amounted to little more than a list of Departmental suggestions for amending the 2001 Act".[134]

In its submission to the Committee, the Cabinet Office identified a number of issues relating to the workings of the *Regulatory Reform Act 2001*:

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130 Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001*, 31 January 2005, HC 273 2004-05, para 1

131 Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001*, 31 January 2005, HC 273 2004-05, para 7

132 Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 6 February 2006, HC 878 2005-06, para 22

133 Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 6 February 2006, HC 878 2005-06, para 26, see also table 2

134 Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001*, 31 January 2005, HC 273 2004-05, para 12

- The "two-year rule", which prevents the amendment of legislation less than two years old
- The lack of an express power to subdelegate in the RRA
- The requirement that the reduction, removal or imposition of burdens must affect a person in the carrying-on of an activity
- The prohibition on removal or reduction of burdens which only affect a Minister or Government Department
- The requirement that an RRO must remove or reduce burdens
- The definition of "burden", which currently prevents the removal or reduction of purely administrative burdens
- The absence of a power to correct errors and omissions
- The time scale for first-stage scrutiny.[135]

In its report, the Committee set out its "preliminary comments" on some of the issues raised by the Cabinet Office.

### *a. Regulatory reform order powers*

The Committee was very cautious about introducing the power of sub-delegation to the regulatory reform order process:

> The introduction of a power to sub-delegate within the RRO process would widen significantly the scope for Ministers to amend primary legislation. In our view, such a change would go beyond the mere tidying up of some minor or inconvenient aspects of the present power and would amount to a constitutionally significant extension of the RRO process. It could allow Ministers to make less specific provision in a RRO itself, leaving a substantial proportion of the law being reformed to be made subsequently by ordinary statutory instrument, which inevitably receives less searching scrutiny than we apply to an RRO.[136]

The Committee was also cautious about amending the two-year rule, which "was incorporated into the legislation to discourage over-frequent legislative amendments". Section 1(4) of the *Regulatory Reform Act 2001* states:

> No order 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, otherwise than merely for consequential or incidental purposes-
>
> (a) by an Act passed not more than two years before the day on which the order is made, or
>
> (b) by any subordinate legislation made not more than two years before that day,

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[135] Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001*, 31 January 2005, HC 273 2004-05, Supplementary Memorandum from the Cabinet Office, Ev 10

[136] Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001*, 31 January 2005, HC 273 2004-05, para 21

> but this subsection does not prevent an order under this section from re-enacting without substantive amendment any provision which has been so amended.

In evidence, Ruth Kelly told the Committee that the second part of the rule had caused difficulties with a number of proposals. The Committee considered that:

> … if the rule (or the second part of it) were removed an alternative way of achieving its purpose should be sought. It also seems to us that Departments need to develop procedures for checking whether there have been relevant amendments to the legislation which they propose amending, when preparing proposals for RROs.[137]

While the Committee was more sympathetic to the Government's concern about the definition of the "carrying on of an activity", which limited the Government's power to remove burdens that affected people only once, it observed that removal of the requirement would "have implications for the power to create new burdens". The Committee continued:

> … If the requirement to relate to an activity were removed in relation to existing burdens, some other kind of limitation on the power to impose new burdens would be needed, if RROs were not to become a dramatically more powerful tool in creating new legislative burdens.[138]

Similarly, the Committee accepted the case for removing burdens that fell solely on Ministers or departments. However, again, this "should not have the potential to increase burdens on individuals or businesses".[139]

In response to the suggestion that not every RRO should reduce or remove a burden, the Committee traced the origins of the *regulatory Reform Act 2001* from the *Deregulation and Contracting Out Act 1994* and also noted that the Prime Minister had encouraged departments to take a de-regulatory approach.

The Committee believed that the existing provisions were generally adequate to correct errors and omissions in legislation.

The Committee drew the following conclusion on the overall effect of the Government's suggestions:

> 31. We questioned whether the cumulative effect of the changes canvassed by the Minister would not simply create a general power to amend the law by Ministerial order. The Minister noted that the RRO process already incorporated a number of safeguards in the form of maintaining necessary protections, rights, freedoms and benefits to the public and so forth and that the Government will

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[137] Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001*, 31 January 2005, HC 273 2004-05, para 22

[138] Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001*, 31 January 2005, HC 273 2004-05, para 25

[139] Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001*, 31 January 2005, HC 273 2004-05, para 27

> keep the need for appropriate safeguards foremost in mind in considering any changes.
>
> 32. As noted above, we think there may be aspects of the present power to make RROs which could be reformed without detriment. Others, however, seem to us to raise important policy issues requiring careful consideration by Parliament. It will also be necessary to look at the cumulative effect of any package of changes which is brought forward to ensure that the power to reform legislation by subordinate instrument is not unacceptably wide. In section 4, we discuss the possibility of creating new processes for implementing Law Commission recommendations and making amendments to core company law by subordinate legislation.[140]

### *b. Regulatory reform orders – parliamentary procedure*

The Committee then considered the Government's comments on the parliamentary process:

> The Government has repeated its familiar argument that, in respect of some proposals, the Regulatory Reform Act procedure is either too long or too short, depending on the complexity of the Order, or it involves an unduly rigorous degree of scrutiny.

It continued:

> The Cabinet Office still seems to want to explore the possibility of a two-tier procedure, whereby one class of proposed draft orders—so-called "straightforward" proposals—would be subject to a lesser degree of scrutiny than the other class—so-called "complex" proposals. The suggestion seems to be that "straightforward" orders should be progressed through their parliamentary stages more rapidly and less rigorously than "complex" orders and as is currently provided for by section 6(2) of the RRA (and the Committee's Standing Order). This is not a new suggestion from the Cabinet Office. In an earlier report on the working of the Act, we indicated that we felt that any significant change in the current scrutiny arrangements would be impractical, because of the problems inherent in having to decide case-by-case on the appropriate procedures to be followed in the case of any particular proposal. For example, we questioned what criteria could be used to distinguish whether or not a proposal was "straightforward" or "complex"? Who would have the authority for determining whether a proposal was "straightforward" or "complex"? Those questions have still not been adequately answered. Although the Cabinet Office has questioned again the length of the first stage scrutiny process, it has not provided any new evidence. As we stated previously, even the simplest and most widely supported regulatory reform proposals would require no less scrutiny than did the proposals brought forward under the old Act. It is also necessary to bear in mind, that if, as the Minister suggested, larger proposals are likely to be coming through, it may be impractical for the Committee to complete and publish its findings on them in fewer than 60 days. It is perhaps worth noting that complexity is not simply determined by the length of the proposal. One distinctive advantage of the

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[140] Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001*, 31 January 2005, HC 273 2004-05, paras 31-32

> standard 60 day period is that it provides certainty to the public who may wish to provide evidence to the Committee. An alternative arrangement involving periods of varying length depending upon the apparent complexity of the proposals simply adds unnecessary complexity without any practical benefit to those who wish to submit evidence. From the public's point of view, the process should be simplified, not made more complicated. **Our view, as previously expressed in our Third Special Report (2001-02), is that we have yet to see any hard evidence that a period of less than 60 days for the initial scrutiny period would be appropriate**.[141]

### *c. Law Commission recommendations*

The Committee also revisited other issues it had previously raised, in anticipation of the Government's review of the RRA. It considered that "there might be a case a fast-track through Parliament, subject to safeguards similar to those we and our Lords counterparts operate in respect of RROs" for non-controversial Law Commission proposals for changes to statute law and concluded:

> **Provided there is widespread support for introducing such a bespoke, fast-track process for implementing Law Commission proposals by order, then we consider the case for such a new legal power deserves further exploration within the Government's review**.[142]

The Committee also supported the Trade and Industry Select Committee's desire to see company law amended by means of secondary legislation, although it sought consideration of which committee, it or some other, should review such proposals.[143]

### *d. Government response to the Committee*

David Miliband's response to the Committee was published in March 2005. He welcomed the Committee's reaction of the Government's interim review. He assured the Committee that "the Government fully recognises the constitutional significance of the RRA and will not undertake any reforms lightly". He announced that the review of the act would take place in 2005 and incorporate a full public consultation. He also informed the Committee that proposals to reform company law were "already well developed" and that it was more likely that the *Company Law Bill* would contain a power to reform company law by super-affirmative order.[144]

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[141] Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001*, 31 January 2005, HC 273 2004-05, paras 35-36

[142] Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001*, 31 January 2005, HC 273 2004-05, para 41

[143] Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001*, 31 January 2005, HC 273 2004-05, para 43

[144] Regulatory Reform Committee, *Government Response to the Committee's First Special Report of Session 2004-05: Operation of the Regulatory Reform Act 2001*, 11 March 2005, HC 431 2004-05. The *Company Law Reform Bill 2005-06* [HL Bill 34 of 2005-06] was introduced in the House of Lords on 1 November 2005 and received its second reading on 11 January 2006. Part 31 of the Bill includes the power to reform company law using the super-affirmative procedure.

# VI Other approaches to reducing regulation

As well as amending or removing existing regulations, there are a number of other ways in which governments attempt to deal with the regulatory burden. The following sections examine some initiatives and the Government structures charged with identifying and tackling regulatory issues.

## A. Better regulation

Successive governments have sought to deal with the regulatory burden on business in a number of ways: clarifying the likely costs to business of regulatory initiatives, making efforts to improve the drafting of legislation before it reaches the statute book, and revising or removing existing regulations.[145]

Following the 1997 General Election the Labour Government announced its approach, summarised by David Clark, then Chancellor of the Duchy of Lancaster:

> Some regulation is necessary for public and consumer protection, for example to ensure food safety, and to carry out the functions of Government. 'Deregulation' implies that regulation is not needed. In fact good regulation can benefit us all – it is only bad regulation that is a burden. That is why the Government's new regulatory policy will concentrate on ensuring that regulations are necessary, fair to all parties, properly costed, practical to enforce and straightforward to comply with.[146]

Since then this emphasis on better regulation – rather than deregulation per se – has marked the Government's policy of regulatory reform, as noted in the 2002 Pre-Budget Report:

> Whereas effective and well-focused regulation can help to correct market failures, promote fairness and ensure public safety, unnecessary or poorly enforced regulation can restrict competition, stifle innovation and deter investment. The Government is therefore committed to regulatory reform in the UK and EU.[147]

The application of this principle of "better regulation" can take many forms. The Government acknowledge that "classic" or "prescriptive" regulation is not always the best option. The Cabinet Office guidance on regulatory impact assessment refers to the Better Regulation Task Force report on *Alternatives to Regulation*.[148]

The Cabinet Office has set out a range of alternatives to state regulation, from "do nothing/no intervention", through self-regulation (for example codes of practice) to "market-based instruments (taxes, subsidies and user charges)".[149]

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[145] A good summary of the key developments in regulatory control since the 1980s is given in, National Audit Office, *Better regulation: making good use of regulatory impact assessments*, 15 November 2001 HC 329 2001-02, Appendix One p40

[146] Cabinet Office News release CBA 46/97, *Better regulation not deregulation*, 3 July 1997

[147] HM Treasury, *Pre Budget Report* Cm 5664 November 2002 para 3.28.

[148] Better Regulation Commission, http://www.brc.gov.uk/downloads/pdf/stateregulation.pdf

[149] Cabinet Office, http://www.cabinetoffice.gov.uk/regulation/ria-guidance/content/alt-regulation/index.asp

Where regulation appears necessary, legislators are encouraged "to ensure that everything necessary for compliance, monitoring and enforcement is in place, that monitoring costs are minimised and enforcement is adequately resourced".[150] There are also various steps that can be taken to reduce the burden of regulation or its disproportionate impact on small business. One initiative is the arrangement of common commencement dates for regulations affecting enterprise: it is proposed that where possible new employment regulation will be timed to commence either in October or April of each year, making it easier for employers to adjust to changes in the law. [151]

Another approach is to allow more flexibility in achieving regulatory ends, such as the "comply or explain" option, whereby companies can choose not to comply with a particular requirement, but must describe and explain in their annual reports how they are achieving the Government's objectives. Flexibility can also be achieved by allowing voluntary opt-out of certain provisions. Another approach, known as "sunsetting" is described as follows:

> Where regulation addresses problems in fast moving markets such as the information and communication sector, areas of scientific uncertainty, or emergency measures such as terrorism, it should be regularly revisited and phased out if it no longer achieves its objectives. Sunsetting achieves this by adding a date into the regulation itself after which it no longer applies. If Parliament or Government wants to keep it in place, sunsetting forces them to go through the legislative process again and reconsider the detail.[152]

The OECD has published a book entitled *From Red Tape to Smart Tape: Administrative Simplification in OECD Countries* on the various tools and measures that have been used by various countries to reduce red tape and make regulations more efficient.[153]

A prominent concern is possible damage to UK competitiveness that may result from excessive regulation. In March 2005 a Trade and Industry Select Committee report considered the question of employment regulation and came to the following conclusions:

> Debates about labour market flexibility in the UK have appeared polarised. Business organisations consider that an increasing burden of regulation is constraining employers' ability to run their companies efficiently; whereas trade unions have been rather uneasy with the notion of labour market flexibility, which has at times appeared as a synonym for making it easier for companies to hire and fire. We are not convinced that the burden of regulation is excessive or damaging to competitiveness at present. But we do not argue for significant extra

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[150] Better Regulation Taskforce *Imaginative Thinking for Better Regulation* September 2003, http://www.brc.gov.uk/publications/imaginativeregulation.asp

[151] See DTI Press Release, *Government consults on common commencement dates for new regulations,* 30 April 2004 http://www.wired-gov.net/WGLaunch.aspx?ARTCL=24188; See also DTI list of Common Commencement dates: http://www.dti.gov.uk/ewt/common_comence.pdf

[152] Better Regulation Taskforce, *Imaginative Thinking for Better Regulation*, September 2003

[153] A copy can be ordered online from the OECD website at: http://217.26.192.119/cgi-bin/OECDBookShop.storefront/EN/product/422003061P1

regulation: we support the principles of flexibility allied to social cohesion set out in the Lisbon Agenda.[154]

## 1. Regulatory Impact Assessments

In better regulation policy considerable emphasis has been placed on the development of Regulatory Impact Assessments (RIAs). The current policy was established in August 1998[155] and requires that new legislation or regulation, which has a non-negligible effect on business, charities or the voluntary sector, has to be accompanied by a RIA. Guidance has been created for regulators and policy-makers on how to prepare RIAs. The main features of RIAs were explained in a report by the National Audit Office:

**What a full regulatory impact assessment is expected to cover**

| | |
|---|---|
| Purpose and intended effect | Identifies the objectives of the regulatory proposal |
| Risks | Assesses the risks that the proposed regulations are addressing |
| Benefits | Identifies the benefits of each option including the "do nothing" option |
| Costs | Looks at all costs including indirect costs |
| Securing compliance | Identifies options for action |
| Impact on small business | Using advice from the Small Business Service |
| Public consultation | Takes the views of those affected, and is clear about assumptions and options for discussion |
| Monitoring and evaluation | Establishes criteria for monitoring and evaluation |
| Recommendation | Summarises and makes recommendations to Ministers, having regard to the views expressed in public consultation[156] |

A list of all RIAs is published twice each year as a Command Paper by the Cabinet Office. The most recent was released in November 2005 listing the title of full and final Regulatory Impact Assessments completed by each department from 1 January to 30 June 2005.[157] The next such paper is expected in March 2006.

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[154] House of Commons Trade and Industry Committee, *UK Employment Regulation, Seventh Report of Session 2004–05*, (HC 90-I) 21 March 2005

[155] In April 1993 departments were formally required to publish an assessment of the likely costs to business of complying with any proposed legislation presented to Parliament which would have an impact on business. Formal arrangements for the publication of CCAs were confirmed in written answers, both in relation to European legislation (HC Deb 19 July 1993 c 24W), and domestic legislation (HC Deb 19 October 1993 c 202W; revised HC Deb 19 July 1994 cc 182-3W) Lists of all these compliance cost assessments (CCAs) were published regularly.

[156] *Better regulation: making good use of regulatory impact assessments*, 15 November 2001 HC 329 2001-02 p 16, p 3

[157] Better Regulation Executive,

The National Audit Office (NAO) announced on 2 December 2002 that it would be taking on the new ongoing role of independently evaluating the quality and thoroughness of a sample of RIAs. After hearings held by the Committee of Public Accounts on the 2001 NAO report *Better Regulation: Making Good Use of Regulatory Impact Assessments*,[158] the Cabinet Secretary invited the Comptroller and Auditor General to undertake this role. The NAO strongly support the use of RIAs as a means to foster better regulation as was made clear in *Better regulation: making good use of regulatory impact assessments* published in November 2001.[159]

RIAs must also assess the impact of regulations on all areas of society including consumers as well as the impact on business.[160] A written answer in March 2004 outlined the arrangements for monitoring the quality of RIAs:

**Regulatory Impact Assessments**

> **Mr. Stephen O'Brien**: To ask the Minister for the Cabinet Office if he will make a statement on the monitoring of the (a) quality and (b) thoroughness of regulatory impact assessments. [160135]
>
> **Mr. Alexander**: Cabinet Office Regulatory Impact Unit (CORIU) continues to work with departments to ensure that Regulatory Impact Assessments (RIAs) are consistent with the most recent guidance. From April this year departments will have to provide information on better regulation, including their compliance with the RIA process and their use of RIAs, as part of their annual reporting requirements,
>
> The National Audit Office (NAO) has undertaken an ongoing role to evaluate the quality and thoroughness of a sample of RIAs each year. The recently published NAO Compendium Report on the Evaluation of RIAs for 2003–04 noted that the CORIU has achieved significant progress in increasing the quality of RIAs.[161]

Some work critical of the current use of RIAs was published by the British Chambers of Commerce in February 2003 – in particular, that by themselves, RIAs did not lead to any regulations being removed from the statute book:

> RIAs are supposed to promote the achievement of policy objectives through non-legislative means but in the event they do not reduce the number of regulations … The quantification of costs and benefits of regulations is also patchy leading to the possibility of these estimates being used to promote, as distinct from objectively assessing, the regulations. Costs and benefits for business were quantified in 69% and 20% of RIAs [that the study examined] … We accept that benefits are more difficult to assess than costs. Those estimates made were accepted as reasonable by half of those we surveyed and do help refine the compliance burden on industry.[162]

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http://www.cabinetoffice.gov.uk/regulation/documents/pdf/ria/ria_command_paper05.pdf

158 HC329 Session 2001-02: http://www.nao.org.uk/guidance/focus/0102329_pp12-13.pdf

159 *Better regulation: making good use of regulatory impact assessments*, 15 November 2001 HC 329 2001-02 p8, http://www.nao.gov.uk/publications/nao_reports/01-02/0102329.pdf

160 HC Deb 4 March 2004 c1063W

161 HC Deb 16 March 2004 c218W

162 Tim Ambler et al., *Do Regulators Play by the Rules?*, British Chambers of Commerce, February 2003 page 3.

The *Regulatory Impact Assessment (Audits) Bill,* a Private Member's Bill was introduced by Archie Norman and had its first reading in the Commons on 11 February 2004. The Bill, which failed to make progress, proposed two measures:

> First, it suggests that all RIAs should be subjected to scrutiny by independent auditors at the point at which they are prepared for use by stakeholders in the legislative process.
>
> Second, it proposes that there be a subsequent full audit. This should be held once a regulation has been in force long enough for its associated costs and benefits to become reasonably clear. As part of this post hoc audit, an assessment of the actual costs and benefits of a particular piece of regulation should be made. It also requires the responsible minister (as is already required of initial RIAs) to acknowledge that he has read and understood the contents of this audit.
>
> The combination of these two measures will increase confidence in the reliability and comprehensiveness of RIAs, whilst also strengthening pressure to produce them to a high quality. The audit would ensure the assessment process has been thorough, and based on reasonable and honest assumptions. The prospect of subsequently being exposed will substantially diminish the incentive on ministers and officials to understate the likely cost of regulations.[163]

## 2. Quantifying the Burden of Regulation

A major survey of the academic literature on the impact of government regulations on small firms across the EU, as well as the USA, Australia and New Zealand – published by the Small Business Service in 2002 – found that "there is no definition of compliance costs that has gained wide acceptance", although "despite initial scepticism on behalf of government departments, in all the countries reviewed government had accepted that the burden of regulation has a disproportionate impact on small firms".[164]

The Organisation for Economic Co-operation and Development (OECD) has a Regulatory Reform Programme aimed at helping governments improve regulatory quality by "reforming regulations that raise unnecessary obstacles to competition, innovation and growth, while ensuring that regulations efficiently serve important social objectives."[165] The OECD's review, *Government capacity to assure high quality regulation: regulatory reform in the United Kingdom*, 2002 is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.[166] The review gives an assessment of the entire regulatory regime in the UK and summarises the position as follows:

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[163] ePolitix briefing 17 February 2004: http://www.epolitix.com/EN/Legislation/200402/911dec55-f6bd-4c8e-89c9-17887aee6a35.htm

[164] F Chittenden et al (Manchester Business School), *Regulatory burdens of small business: a literature review*, Small Business Service 2002 pp 2-3.

[165] http://www.oecd.org/topic/0,2686,en_2649_37421_1_1_1_1_37421,00.html

[166] http://www.oecd.org/dataoecd/46/38/2766135.pdf

> UK regulatory policies are anchored in a centuries old twin track tradition of informal decision-making and respect for the rule of law. With twenty years of continuous effort behind it, the United Kingdom is one of the most experienced OECD countries in regulatory reform. Privatisation and at a later stage economic policies to stimulate competition have provided a major impetus for deregulation and reform of the regulatory system, and, placed regulatory reform among recent Governments' top priorities. In recent years, regulatory policies have been broadened to include both consumer protection and market efficiency. Improving regulatory quality has increased in importance, alongside eliminating regulations.
>
> A constant up-grading of instruments has occurred simultaneously with the establishment of an array of regulatory policies, institutions, and tools many of them innovative and unprecedented. This has formed a set of broadly efficient, transparent and accountable regulatory systems of high quality.

### *a. Regulation – Less is More*

An important report from the Better Regulation Task Force entitled *Less is More* was published in March 2005.[167] This set out two key recommendations for future Government policy on regulations which have since been adopted:

> • the new Dutch approach of introducing a target for reducing administrative costs to bear down on the paperwork burdens faced by business; and
> • a "One in, One out" rule for regulation, where new regulations have to be matched by deregulatory measures.

Implementation of the Dutch approach is expected to result in a £16 billion increase in GDP for an investment of around £35 million and is summarised as follows:

> The approach has three components - measurement of the burden, political commitment to a target and an organisational structure that provides incentives to achieve that target. One of the most unfortunate things about administrative burdens is that those imposing them often do not think about or cannot see the true costs which they are imposing on others. To overcome this, we need a strict way to measure those costs and a target to reduce them. We are therefore recommending that the UK follow a similar path to the Dutch, as summarised below:
>
> **1. Measuring the administrative burden**
>
> • Every government department should use a standardised approach to measure the existing administrative burden which it imposes on business through its regulatory activities. • The measurement should include all the administrative obligations imposed by central government departments and regulatory agencies under both national and European legislation.
>
> **2. Committing to a target for reducing administrative burdens**

[167] BRTF, *Regulation – Less is More: Reducing Burdens, Improving Outcomes*, March 2005, http://www.dti.gov.uk/ewt/betterregulation.htm

• The government needs to agree that it will be a priority to reduce the administrative burden across the whole of government regulation and set a sensible reduction target. The Netherlands chose a target of 25% over four years, implemented with some limited flexibility across different government departments.
• The target needs to be a net target, meaning that the agreed level of reduction is achieved after taking into account any new burdens from regulations brought in by the government or the EU during the period of the target.

**3. Setting up the necessary organisational structure**

• To incentivise attainment of the target and ensure delivery, the government needs to set up an organisational structure to oversee the process. We think this requires a programme management team, an independent monitoring and assessment body and dedicated resources within each department and regulator.
• The Dutch have established an independent public body (called Actal) to act as a watchdog. Departments are obliged to send Actal details of all new legislative proposals and their calculation of the administrative burden involved. Actal reviews the calculations before the proposed legislation is sent to the Dutch Council of Ministers and to Parliament and issues an opinion. Actal also evaluates the administrative burden reduction programmes that departments are obliged to present annually to Parliament.
• The Dutch Council of Ministers considers Actal's comments when deciding whether to endorse new legislation. If the Council of Ministers approves new legislation, Actal's comments are made available to the Dutch Parliament when it debates the bill.
• In the Netherlands, the Minister of Finance takes responsibility for achieving the administrative burden reduction target and delivers a progress report to Parliament every six months. The Minister is supported by a dedicated cross-departmental team that coordinates delivery of the programme across government.
• Each government department needs a small unit of civil servants dedicated to supporting the reduction of administrative burden, but the focus of the effort must be within departmental teams currently working on creating new regulations.

## 3. Better Regulation Action Plan

In May 2005 the Chancellor Gordon Brown announced the *Better Regulation Action Plan* which accepted the Task Force's recommendations:

> To motivate delivery and give transparency - we will, as David Arculus and the Better Regulation Task Force recommended, by no later than the Pre-Budget Report of 2006 and earlier if possible, set challenging, quantifiable targets to reduce the regulatory burden and departments will prepare measurable simplification plans to implement the Hampton reforms.
>
> Departments are already beginning to measure the total administrative burden of regulation and will work with business to identify where regulations are needlessly difficult.[168]

[168] HM Treasury Press Notice, *Chancellor launches Better Regulation Action Plan*, May 2005: http://www.hm-treasury.gov.uk/newsroom_and_speeches/press/2005/press_50_05.cfm

The Action Plan largely concerns the introduction of a new risk based approach to the regulatory regime of inspection and enforcement:

> In the old regulatory model – which started in Victorian times – the implicit regulatory principle has been 100 per cent inspection of premises, procedures and practices irrespective of known risks or past results. The theory has been to inspect everyone continuously, demand information wholesale, and require forms to be filled in at all times, the only barrier to the blanket approach a lack of resources.
>
> The new model we propose is quite different. In a risk based approach there is no inspection without justification, no form filling without justification, and no information requirements without justification. Not just a light touch but a limited touch. Instead of routine regulation attempting to cover all, we adopt a risk based approach which targets only the necessary few.
>
> (…)
>
> As announced in the Queen's Speech and following the Hampton Review we will legislate in the new year to reduce 29 regulators to just seven, embed the risk based approach at the heart of regulators' statutory duties, make it quicker and easier to remove unnecessary regulations and reform the penalty regime, doing more to help companies comply with the rules but creating tougher penalties for persistent offenders.

The Announcement also mentioned a second deregulatory Bill to be introduced in the next parliamentary session:

> And in the next session we will introduce a second bill removing outmoded and unnecessary regulations. We will begin a widespread consultation with businesses to identify regulations that should be removed or simplified.

In addition, the following commitments were made with regard to European regulation and the implementation of government policy:

> From 2006 onwards we will continue to argue for better European regulation:
>
> - Developing a clearer voice for business in the EU rule-making process through the commission's proposed independent advisory network; and
> - Working with member states to apply risk-based regulatory practice across national regulatory frameworks throughout Europe.
>
> Finally, to make sure this agenda happens - an agenda that lets be honest with ourselves does require a culture change in government - our programme of reform is being be led by a new Better Regulation Executive, which will be headed by someone recruited from business, so extending this new relationship of trust between government and business

## 4. Regulation and small firms

It is widely recognised that regulations can have a disproportionate effect on small business, particularly in the area of employment. Successive governments have

developed regulatory policies and principles to reform or repeal outdated provisions and guide the preparation of new regulations. Among these is the requirement that part of the development of all regulation should include an assessment of their impact, in particular on small firms.

The Cabinet Office guidance incorporates a requirement that all RIAs must include a "Small Firms' Impact Test" (SFIT), except where the proposal solely affects the public services. If the proposal solely impacts on the public services, the RIA must state explicitly that a "Small Firms' Impact Test is not required in this RIA because the proposal impacts only on the public services. This has been verified by the completion of a Public Services Threshold Test".[169] The procedure for the SFIT, also known as the "Litmus Test" is set out in the guidance given on the Cabinet Office's website.[170]

Another way in which the concerns of small business are taken into account in the process of developing regulations is through "Regulatory Impact Statements". A National Audit Office Report of 4 March 2004 entitled *Evaluation of Regulatory Impact Assessments Compendium Report 2003-04* explained the role of the Small Business Service (SBS) in such statements:

> 2.30 Business representatives and others have expressed concerns about regulation imposing unnecessary or disproportionate costs on small businesses, charities and voluntary organisations. For this reason departments are expected to consider these impacts during the RIA process, and include a section outlining these impacts. They are expected to consult with the Small Business Service (SBS), which is entitled to issue a statement in the RIA at the initial RIA stage if it disagrees with the department's assessment. If the SBS disagrees at a later stage in the process it can produce a Regulatory Impact Statement (RIS), which is separate to the RIA and forms part of the Cabinet Office clearance process.[171]

The Small Business Service's website gives the following explanation of the requirement on government departments to consult them when preparing regulatory impact assessments:

> **Regulatory Impact Assessments**
>
> The Cabinet Office makes clear in its "Better Policy Making: A Guide to Regulatory Impact Assessment", that Regulatory Impact Assessments (RIAs) will record whether or not the SBS was consulted, and the SBS will have the right to have its views recorded in RIAs.
>
> Government Departments need to involve the SBS on all proposals that will affect small businesses, at the stage when regulatory policy and coverage are being decided.

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[169] *Better Policy Making: A Guide to Regulatory Impact Assessment*, January 2003: http://www.cabinetoffice.gov.uk/regulation/ria/ria_guidance/index.asp

[170] Cabinet Office, *Small Firms Impact Test*, http://www.cabinetoffice.gov.uk/regulation/ria/ria_guidance/small_firms_impact_test.asp

[171] NAO: http://www.nao.org.uk/publications/nao_reports/03-04/0304358.pdf

## 5. Regulation from Europe

A considerable amount of new regulation emanates from the European Union. The way in which these obligations are framed in domestic law can lead to over implementation or "gold plating". This European dimension to the problem has been taken up in a variety of initiatives at EU level. For example there is the *European Commission Work Programme 2006* which the DTI summarises as follows:

> The Commission publishes its annual work programme containing the planned major legislative and policy initiatives at the start of each calendar year on its website.
>
> The European Commission's 2006 Work programme includes links to the published roadmaps for each expected proposal. These roadmaps are a relatively new Commission initiative, designed to give stakeholders an overview of what each proposal will seek to achieve; what the policy options are; what impact assessment work is planned; and, crucially, what consultation with stakeholders is foreseen and when. The UK fully supports this initiative. It brings greater transparency to the EU policy-making process and provides an all-important 'heads-up' to stakeholders.
>
> To help with the roadmaps we have provided translations where necessary and a glossary of commonly used terms. In addition, each roadmap's reference number indicates the EU Commission Directorate General responsible (e.g. for the 2006/MARKT/002 roadmap, MARKT means the Internal Market Directorate General).[172]

A joint statement from the Irish, Dutch, Luxembourg, UK, Austrian and Finnish Presidencies of the European Union, in December 2004, set out the following proposals:

- a common European methodology for the measurement of administrative burdens should be presented and implemented by the Commission as soon as possible in 2005. In particular, a common methodology can be agreed by the end of the Luxembourg Presidency;
- subsequently, and before the end of 2005, assessment of the administrative burden should be included in integrated European Commission impact assessments for all new Directives, alongside an explanation of how these have been kept to the minimum needed to ensure the effective delivery of the political objectives of the legislation in question;
- the methodology to measure administrative burdens should also be used when developing simplification proposals. This will ensure that simplification contributes effectively to the competitiveness of the European economy and to the objectives of the Lisbon strategy; and
- the Council could review annually, on the basis of a Commission paper, the way in which the administrative burden of EU regulation has changed, for example over a twelve month period. The High Level Group recommended the introduction of targets for the reduction of the administrative burden, while the ECOFIN Council has invited the Commission and Member States to consider developing

[172] DTI: http://www.dti.gov.uk/ewt/eu_better.htm

quantitative objectives for reducing the administrative burden on business in selected areas.[173]

# B. Government

## 1. Better Regulation Commission

On 3 July 1997, the Labour Government launched the new policy initiative 'Better Regulation'. The Better Regulation Task Force replaced the Deregulation Task Force; a body set up by the previous Conservative Government to reduce the administrative burden on business. The Task Force was supported by the Regulatory Impact Unit in the Cabinet Office (now the Better Regulation Executive).

In 2005, the Better Regulation Commission replaced the Better Regulation Task Force and will perform basically the same functions with an enlarged remit:

**Background**

The Government announced in Budget 2005 that it would establish a Better Regulation Commission (BRC) to provide independent advice to government, from business and other external stakeholders, about new regulatory proposals and about the Government's overall regulatory performance. The Commission will continue the challenge role carried out by the Better Regulation Task Force, as well as take on new responsibilities following the announcements in Budget 2005, including vetting departmental plans for simplification and administrative burden reduction.

**Terms of Reference**

The Better Regulation Commission is an independent advisory body whose terms of reference are:

'To advise the Government on action to:

- reduce unnecessary regulatory and administrative burdens; and
- ensure that regulation and its enforcement are proportionate, accountable, consistent, transparent and targeted'

The work of the Commission will include:

- Challenging departments and regulators to ensure that regulation, and its enforcement accord with the five Principles of Good Regulation - proportionality, accountability, consistency, transparency and targeting;
- Vetting plans from departments and regulators to reduce administrative burdens;
- Scrutinising progress by departments and regulators to reduce wider regulatory burdens, including use of alternatives and deregulation;

[173] *Advancing regulatory reform in Europe*: http://www.hm-treasury.gov.uk/media/95A/52/6presidencies.pdf

- Investigating specific regulatory and policy issues and making recommendations to Government through published independent reports for Government to respond to within 60 days;
- Working with business and other external stakeholders in EU Member States, and the EU institutions, to promote better regulation in Europe.

The scope of the work carried out by the Commission will cover the private sector, public sector, voluntary sector and EU regulatory issues.

**Reports**

The Commission will continue the Better Regulation Task Force tradition of researching and publishing studies of particular regulatory issues. Anyone can suggest topics for new studies. Once a subject has been chosen, these reviews are taken forward by sub-groups of Commission members who set their own working methods and priorities.[174]

## 2. Better Regulation Executive

The Cabinet Office's Better Regulation Executive (BRE) replaces the Regulatory Impact Unit and is described as follows:

The Better Regulation Executive (BRE) was established in May 2005.

Tasked with taking forward the Government's better regulation agenda, the BRE has overall responsibility for the Government's commitments to:

- regulate only when necessary
- set exacting targets for reducing the cost of administering regulations
- rationalise the inspection and enforcement arrangements for both business and the public sector

This will involve implementing the recommendations of two major independent reports published on Budget Day in March 2005:

- The Better Regulation Task Force (BRTF) report "Regulation - Less is More"
- Philip Hampton's Report, "Reducing administrative burdens: effective administration and enforcement"

The BRE will also take forward the work previously carried out by the Regulatory Impact Unit including:

- scrutinising new policy proposals from Departments and Regulators
- speeding up the legislative process to make it easier for Departments to take through deregulatory measures
- working with Departments and Regulators to reduce existing regulatory burdens affecting business and frontline staff in the public sector
- driving forward the better regulation agenda in Europe

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[174] Better Regulation Commission: http://www.brc.gov.uk/about_us/

> The work of the BRE will cover public, private and European issues and also how inspection and enforcement arrangements are carried out on the ground.
>
> The Executive Chair will work to the Chancellor of the Duchy of Lancaster, who has the Ministerial lead on this agenda across Whitehall.[175]

A prominent aspect of the new approach relates to the process of regulatory simplification:

> **Simplification**
>
> Government departments are developing rolling programmes of simplification following the recommendations made in the Better Regulation Task Force report 'Less is More'. An important part of this process is for business and other stakeholders to make submissions to support reforms they would like to see taken forward as part of departmental simplification plans. The aim is to reduce regulatory burdens wherever possible without removing necessary protections.
>
> The Better Regulation Executive (BRE) has worked with business and other stakeholders to develop a process for submitting regulatory simplification proposals to government. This delivers the second recommendation of the BRTF report Less is More
>
> Full details of the process, including extensive guidance on simplification and a web-based tool for making regulatory reform suggestions to government can be found on the www.betterregulation.gov.uk.[176]

The Department for Trade and Industry (DTI) *Draft Simplification Plan* was published in November 2005.[177] The Plan sets out measures which it says is expected to deliver £1 billion of deregulatory savings over the period 2005-2010 together with a 25% reduction in administrative burdens.

## 3. Cabinet Committees

The Ministerial Panel on Regulatory Accountability (PRA) was set up "to take a strategic overview of the regulatory system and to ensure that the burden of regulation on business is kept to the minimum necessary."

The current structure now has three components:

- Ministerial Committee on Regulation, Bureaucracy and Risk (RB)
  - Sub-Committee on Panel on Regulatory Accountability (RB(PRA))
  - Sub-Committee on Inspection (RB(I))

The terms of reference of these committees are:

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[175] BRE: http://www.cabinetoffice.gov.uk/regulation/about_us/index.asp
[176] BRE: http://www.cabinetoffice.gov.uk/regulation/simplification/index.asp
[177] DTI: http://www.dti.gov.uk/ewt/cutting_red_tape_plan.doc; See also DTI Five year programme, Chapter 3: http://www.dti.gov.uk/about/fiveyearprogramme.pdf

*Ministerial Committee on Regulation, Bureaucracy and Risk*

**Terms of Reference**

'To provide strategic oversight of the better regulation agenda, risk and reducing unnecessary bureaucracy both in the public and private sectors.'

*Sub-Committee on Panel on Regulatory Accountability*

**Terms of Reference**

'To hold departments and their regulators to account for their regulatory performance and to ensure that the burden of regulation on business is kept to the minimum necessary.'

*Sub-Committee on Inspection*

**Terms of Reference**

'To provide strategic oversight of the Government's policy on inspection, in particular to deliver the rationalisation of monitoring and assessment activities that affect the delivery of public services, working with RB(PRA) where appropriate.'

The Prime Minister chairs all three of these committees. Full details of their composition can be found on the Cabinet Office website.[178]

Cabinet Office guidance on policy clearance gives the following advice:

**Panel for Regulatory Accountability**

All regulatory proposals likely to impose a major new burden on business require clearance from the Panel for Regulatory Accountability, chaired by the Prime Minister. The two main exemptions from this are emergency legislation and tax matters considered by the Chancellor in the course of normal budgetary processes. The Panel's consideration is based on a thorough RIA for the proposal being agreed by the Cabinet Office BRE, **before** the proposal can be put to wider ministerial approval. The Panel considers all such proposals in the context of the department's previous regulatory performance and the burden of regulation across key business sectors.

Contact your BRU to find out whether your policy will require clearance from the Panel for Regulatory Accountability.[179]

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[178] Cabinet Office, Ministerial Committees of the Cabinet: http://www.cabinetoffice.gov.uk/secretariats/committees/

[179] Better Regulation Executive: http://www.cabinetoffice.gov.uk/regulation/ria/ria_guidance/policy_clearance.asp#panel

# Appendix 1 – The remit of the Regulatory Reform Committee

Standing Order No. 141

(1) There shall be a select committee, called the Regulatory Reform Committee, to examine—

(i) every document containing proposals laid before the House under section 6 of the Regulatory Reform Act 2001;

(ii) every draft order proposed to be made under section 1 of the Act; and

(iii) every subordinate provisions order or draft of such an order made or proposed to be made under sections 1 and 4 of the Act (except those not made by a Minister of the Crown).

(2) The committee shall report to the House, in relation to every proposals document referred to in paragraph (1)(i) of this order, either

(a) that a draft order in the same terms as the proposals should be laid before the House; or

(b) that the proposals should be amended before a draft order is laid before the House; or

(c) that the order-making power should not be used in respect of the proposals.

(3) The committee shall report to the House, in relation to every draft order referred to in paragraph (1)(ii) of this order, its recommendation whether the draft order should be approved.

(4) The committee may draw the special attention of the House to any subordinate provisions order or draft order referred to in paragraph (1)(iii) of this order, and may report its opinion whether or not the order or draft order should be approved or, as the case may be, annulled.

(5) The committee may report to the House on any matter arising from its consideration of the said proposals, draft orders or subordinate provisions orders.

(6) In its consideration of proposals the committee shall consider in each case whether the proposals—

(a) appear to make an inappropriate use of delegated legislation;

(b) remove or reduce a burden or the authorisation or requirement of a burden;

(c) continue any necessary protection;

(d) have been the subject of, and take appropriate account of, adequate consultation;

(e) impose a charge on the public revenues or contain provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribe the amount of any such charge or payment;

(f) purport to have retrospective effect;

(g) give rise to doubts whether they are intra vires;

(h) require elucidation, are not written in plain English or appear to be defectively drafted;

(i) appear to be incompatible with any obligation resulting from membership of the European Union;
(j) prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise;
(k) satisfy the conditions of proportionality between burdens and benefits set out in sections 1 and 3 of the Act;
(l) satisfy the test of desirability set out in section 3(2)(b) of the Act;
(m) have been the subject of, and take appropriate account of, estimates of increases or reductions in costs or other benefits which may result from their implementation; or
(n) include provisions to be designated in the draft order as subordinate provisions;
and in the case of the latter consideration the committee shall report its opinion whether such a designation should be made, and to what parliamentary proceedings any subordinate provisions orders should be subject.

(7) In its consideration of draft orders, the committee shall consider in each case all such matters set out in paragraph (6) of this order as are relevant and the extent to which the Minister concerned has had regard to any resolution or report of the committee or to any other representations made during the period for parliamentary consideration.

(8) In its consideration of any subordinate provisions order the committee shall in each case consider whether the special attention of the House should be drawn to it on any of the grounds on which (in accordance with paragraph (1)(B) of Standing Order No. 151 (Statutory Instruments (Joint Committee)) the Select Committee on Statutory Instruments may draw the attention of the House to a statutory instrument; and if the committee is of the opinion that any such order or draft order should be annulled, or, as the case may be, should not be approved, they shall report that opinion to the House.

(9) The committee shall consist of fourteen members.

(10) Unless the House otherwise orders, each Member nominated to the committee shall continue to be a member of it for the remainder of the Parliament.

(11) The committee shall have power—
(a) to send for persons, papers and records, to sit notwithstanding any adjournment of the House, to adjourn from place to place within the United Kingdom, and to report from time to time;
(b) to appoint specialist advisers either to supply information which is not readily available or to elucidate matters of complexity within the committee's order of reference; and
(c) to appoint a sub-committee, of which the quorum shall be two, which shall have power to send for persons, papers and records, to sit notwithstanding any adjournment of the House, and to adjourn from place to place within the United Kingdom.

(12) The committee and the sub-committee shall have the assistance of the Counsel to the Speaker and, if their Lordships think fit, the Counsel to the Lord Chairman of Committees.

(13) The committee and the sub-committee shall have power to invite Members of the House who are not members of the committee to attend meetings at which witnesses are being examined and such Members may, at the discretion of the chairman, ask questions of those witnesses; but no Member not being of the committee shall otherwise take part in the proceedings of the committee or sub-committee, or be counted in the quorum.

(14) It shall be an instruction to the committee that before reporting either—

(a) that any proposal should be amended before the draft order is laid before the House, or

(b) that the order-making power should not be used in respect of any proposal, or

(c) that any draft order should not be approved,

it shall afford to any government department concerned an opportunity of furnishing orally or in writing to it or to the sub-committee appointed by it such explanations as the department think fit.

(15) It shall be an instruction to the committee that it report on every draft order (not being a subordinate provisions order) not more than fifteen sitting days after the draft order was laid before the House, indicating in the case of draft orders which it recommends should be approved whether its recommendation was agreed without a division.

# Appendix 2 – The Law Commission

The Law Commission has a statutory obligation to simplify the law. Its website indicates that this is done in a variety of ways:

> 1. Codification of the law
> The Commission believes that the law would be more accessible to the citizen, and easier for the courts to understand, through a series of statutory codes. We are currently working on a code of the criminal law, and have plans to follow this with a project to codify the law of criminal evidence.
>
> 2. Consolidation of Statutes
> Consolidation brings together under one Act all the existing statutory provisions previously located in several different Acts. The law itself remains unchanged, but those who use it can now find it all in one place. For example, the Powers of Criminal Courts (Sentencing) Act 2000 brought together in a single piece of legislation sentencing powers which were previously to be found in more than a dozen Acts.
>
> 3. Statute Law Revision
> Parliament has been enacting statutes for over 750 years. Although many of the older statutes have been repealed, many remain which are obsolete or unnecessary. A Statute Law (Repeals) Act enables a large number of statutes which are no longer of any practical use to be repealed together. However, while it is important to tidy up the statute book, it is just as important to avoid accidentally removing the legal basis for someone's rights, and therefore a great deal of consultation is needed. Since 1965 the whole or part of nearly 5000 enactments have been repealed by Statute Law (Repeals) Acts. The 17th Statute Law Revision report was published in December 2003. More information about current projects is available [on the website].[180]

Another page on the Law Commission's website describes the process of Statute Law Revision:

> **Statute Law Revision**
> In reforming the law, the Law Commission does not just propose new laws. It also proposes the repeal of laws that have become obsolete. This is called 'statute law revision'.
>
> The purpose of statute law revision is to modernise and simplify the statute book, reduce its size and save the time of lawyers and others who use it. This in turn helps to avoid unnecessary costs. It also stops people being misled by obsolete laws that masquerade as live law. If an Act still features in the statute book and is referred to in text books, people reasonably enough assume that it must mean something.
>
> Implementation of the statute law revision proposals is by means of special Statute Law (Repeals) Bills. 17 such Bills have been enacted since 1965 repealing more than 2000 Acts in their entirety.

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[180] Law Commission, *About us- Simplifying the Law*, http://www.lawcom.gov.uk/about.htm

The most recent Statute Law (Repeals) Bill was published on 16 December 2003 and received Royal Assent on 22 July 2004.

Of course, this is a huge task and there are many ancient laws and legal curiosities that are still in use today.

**Next Report and Bill**
The next Statute Law Revision Report is due for publication around the end of 2008. It will contain a draft Statute Law (Repeals) Bill to repeal all the obsolete laws identified in the Report.

**Consultations**
The Law Commission consults widely before finalising its repeal proposals. The purpose of consulting is to secure as wide a range of views on the proposals as is practicable from all categories of persons who may be affected by the proposals. The recommendations for repeal in the following consultations will go towards the next Statute Law Revision Report. Background information is available about the process of repealing obsolete laws.

**Current consultations:**
We are currently consulting on proposals for the repeal of obsolete laws on the police. The consultation will close on 13 January 2006.

**Recently closed consultations:**
A consultation on repeals to the law on criminal repeals closed on 29 April 2005.
A consultation on proposals to repeal laws on Town and Country Planning closed on 30 September 2005.

**Future consultations:**
We are developing proposals for the repeal of obsolete laws on gaols, which we hope to publish in Spring 2006.[181]

Full details of these consultations are available on the Law Commission's website. The website also provides links to the Law Commission's two most recent *Statute Law Revision Reports*.

[181] Law Commission, *Statute Law Revision*, http://www.lawcom.gov.uk/statute.htm

# Appendix 3 – Regulatory Reform Committee report on the Legislative and Regulatory Reform Bill: summary of recommendations and conclusions

1. We recommend that, as a matter of urgency, the Cabinet Office should retrospectively assess the estimates of costs and benefits that have previously been submitted to the House for each RRO with a view to establishing whether or not the estimated savings have been realised and that, if the savings cannot be validated, the Cabinet Office should investigate why and suggest how the RIA process or the delivery of benefits itself could be improved. (Paragraph 25)

2. We reaffirm the recommendation of our predecessor Committee that Departments should be assessed on their progress in removing unnecessary regulations and controls and not simply on their progress in simplifying measures. We recommend accordingly. (Paragraph 26)

3. Given the range of views expressed in the consultation submissions, and in the interests of completeness, we consider that the individual submissions be published on the BRE website alongside its brief summary. We recommend accordingly. (Paragraph 35)

4. We invite the House to consider whether the Part 1 of the Bill should be amended to reserve further specified areas from the scope of the new powers (and, if so, to identify the areas to be reserved). (Paragraph 50)

5. We recommend that Part 1 of the Bill should be amended to provide scope for an effective veto, on the following basis:

first, during the preliminary period for procedural consideration, it should be possible -

> for either House of Parliament by resolution, or
>
> for the relevant committee of either House charged with reporting on the order by recommendation (if not rejected by House resolution),

not only to vary the Minister's recommended procedure on a given draft order, but also to determine that the Part 1 procedure should not apply to it at all;

secondly, if that determination has been made, no further draft order to the same effect (or to the same effect but for modifications) should be laid within two years of the determination date. (Paragraph 59)

6. We invite the House to consider whether - in the case of super-affirmative instruments (however introduced by the relevant Minister) - the Houses or their committees should have their power of suggesting amendments reinforced by a provision to the effect that, if the amendments were agreed by both Houses, the Minister would either have to take the amendments on or discontinue his proposal to legislate by order. (Paragraph 60)

7. We recommend that the Bill should be amended to reinforce Parliamentary procedures in relation to Part 1 orders, so as to reduce the risk of effective scrutiny being by-passed. We offer three options (mutually exclusive in structural terms), in ascending order of preference, for consideration by the House. The first option is closest to the current text of the Bill, the second goes further and the third further still. But none of them fundamentally alters the Bill and none of them extends the scrutiny period beyond what the Cabinet Office states that it needs itself. (Paragraph 65)

8. We invite the House, as a first option, to consider amending Part 1

- to change the 21 day time limit (for not following the Minister's recommended procedure) into a 30 day time limit, and then –

- to provide that the parliamentary time limits for consideration of a Part 1 order should be adjustable upwards, with a maximum adjustment of 30 days, on –

  a resolution of either House, or

  a recommendation of the responsible committee of either House (not rejected by such a resolution). – (Paragraph 67)

9. We invite the House to consider, as a second option providing for stronger reinforcement of Parliamentary control, amending Part 1 –

- to remove the option of negative procedure,

- to merge all time limits into a 60 day limit both for scrutiny and for either House not to follow the Minister's recommended procedure, and also

- to provide that the Parliamentary time limits for consideration of a Part 1 order should be adjustable upwards, with a maximum adjustment of 30 days, on

  a resolution of either House, or

  a recommendation of the responsible committee of either House (not rejected by such a resolution). – (Paragraph 71)

10. We invite the House to consider, as a third option providing for still stronger reinforcement of Parliamentary control, amending Part 1 –

- to delete the negative option,

- to introduce a default rule of super-affirmative procedure,

- to merge all time limits into a 60 day limit (both for scrutiny and for either House not to follow the default procedure), and also

- to provide that the Parliamentary time limits for consideration of a Part 1 order should be adjustable upwards, with a maximum adjustment of 30 days, on -

a resolution of either House, or

a recommendation of the responsible committee of either House (not rejected by such a resolution). (Paragraph 73)

11. The Cabinet Office's Final Regulatory Impact Assessment in effect addresses four possibilities: doing nothing; altering parliamentary procedures alone; adding extras to the 2001 Act; and providing for radical change by conferring on Ministers a power with no outer limit on coverage, as in Part 1 of the Bill. In summary, this Special Report offers for consideration a fifth possibility: leaving the outer limit on coverage unspecified while identifying areas that should be off limits, as not appropriate for delegated legislation, and also tightening aspects of Parliamentary control. All of the recommendations and issues highlighted for consideration in this section identify ways in which the Bill can be amended at Committee and/or Report Stage in a way that ought to be manageable if the principle of the Bill is accepted by the House. (Paragraph 74)

12. We recommend that the Standing Orders be amended to require the responsible Committee to assess the validity, in relation to any order, of any new preconditions (for example the first precondition: that the policy objective could not be satisfactorily secured by non-legislative means). (Paragraph 77)

13. In order to undertake inquiries into regulation more generally, we recommend that the Standing Orders of any successor committee also include the same powers as those granted to departmental select committees under S.O. No. 152. (Paragraph 78)

14. We recommend that the relevant Committee be able to recommend that no further draft order to the same effect (or to the same effect but for modifications) should be laid within two years. In our view, it is essential that the Standing Orders reflects this provision so that the committee has power to indicate its view on the merits of an order i.e. as to whether an order should be made or not and – in the case of a super-affirmative – whether it should be amended. (Paragraph 81)

15. We also recommend that the current provision, as set out in S.O. No. 18(1)(b), that allows us to trigger a debate on the motion to approve the order be retained and supplemented by a further provision to allow the relevant successor committee to require a debate to be held, if (in the committee's view) a draft order is of sufficient political or legal importance (Paragraph 82)

16. The revisions to the Standing Orders, as recommended, would in our view remove uncertainty and would enhance the power of the committee to scrutinise the draft orders while also providing an opportunity for other Members to debate the orders, regardless of whether they had been scrutinised under the superaffirmative procedure. (Paragraph 84)

17. We recommend that the resource implications of the eventual provisions of any Act for our successor committee be assessed at the earliest opportunity with a view to identifying how best the expected extra workload can be scrutinised effectively. (Paragraph 85)