House of Commons

Procedure Committee

Legislative and Regulatory Reform Bill

First Report of Session 2005–06

Report, together with formal minutes, oral and written evidence

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Procedure Committee

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Summary

The Legislative and Regulatory Reform Bill has been presented by the Government as a successor to the Regulatory Reform Act 2001. Building on experience gained from operating that Act, the Government say that Part 1 of the Bill would allow them 'to deliver non-controversial proposals for simplification [of the law]' without being constrained by 'a number of hurdles which inhibited the production of [Regulatory Reform Orders].' [1]

To achieve this the Government has produced a bill which gives Ministers extensive powers to introduce orders to amend primary legislation 'in any way that an Act might'. The tests in the previous legislation have been removed and in their place there are only a number of 'preconditions' which a Minister must consider to have been satisfied and a requirement to undertake public consultation.

Furthermore it is for Ministers to propose what form of parliamentary scrutiny any such order should be subject to.

The procedural implications of the Bill are directly influenced by its scope. The House will expect significantly greater and more elaborate procedural safeguards over the use of a new power whose scope represents a fundamental change in the way Parliament deals with legislation than over the use of a power which is no more than an incremental development of an existing and well-established procedure.

We agree with the Regulatory Reform Committee that, as drafted, the Bill is of major constitutional significance. It is a long-standing, and widely supported, convention that such Bills are taken in Committee of the Whole House and we regret that the Government did not follow that precedent in this case.

The Bill sets out the parliamentary procedures for the consideration of draft orders in some detail. We are not persuaded that this is the correct approach. We have recommended instead that as far as possible the parliamentary procedures should be contained in Standing Orders.

The Bill provides that Parliament (through the relevant committee in each House) is required to decide within 21 days for each proposed order whether the Minister has recommended the correct level of parliamentary scrutiny. This is an unnecessarily demanding timetables and we recommend that it should be extended.

Although the Government has given an undertaking that it would not proceed with an order if the relevant committees determined that it was an inappropriate use of the power (if for example the policy content was highly controversial), there is no provision in the bill allowing the House to veto further proceedings on a draft order. We recommend that there should be.

1 Legislative and Regulatory Reform Bill, Explanatory Notes, paragraph 5.

1 Introduction

1. In October 2005 we announced our intention to examine the procedural implications of what was then described by the Government as its proposed 'Bill for Better Regulation.' In July 2005 the Government published *A Bill for Better Regulation: Consultation Document* which contained proposals to extend 'the power of [Regulatory Reform Orders] RROs to make them an outcome-focused tool for the effective delivery of better regulation.'[2]

2. The consultation followed a review of the operation of the Regulatory Reform Act 2001 (the Act under which RROs are made). That review concluded that the Act 'presented a number of hurdles which inhibited the production of RROs; in particular that the powers of the … Act were too technical and limited, that the scope of RROs should be extended to deliver non-controversial proposals for simplification and that the whole process for delivering an RRO and subsequent scrutiny could be made more proportionate.'[3]

3. A summary of the consultation responses was published in December 2005. On 11 January 2006 the Legislative and Regulatory Reform Bill ('the Bill') was presented and read the first time in the House of Commons. The Bill has three parts. Our inquiry has concentrated on Part 1 (Power to reform legislation etc). Part 2 deals with regulators and Part 3 with legislation relating to the European Communities. The Bill was given a second reading on 9 February.

4. The Regulatory Reform Committee published a special report on the Bill on 6 February.[4] That report, which is a comprehensive and authoritative analysis of the provisions in Part 1 of the Bill, has been of great value to us in our examination of whether the parliamentary procedures proposed in the Bill are appropriate for the extension to existing powers which the Government is proposing.

5. We held an oral evidence session with Mr Jim Murphy, Parliamentary Secretary, Cabinet Office, on 7 February. At that session he was not able to respond to the detail of the Regulatory Reform Committee's recommendations. But he did say that 'many of [the Committee's] recommendations have a good deal of merit and we are minded to see just how we can take on board the specific suggestions.'[5] In the event, however, the Government's response, in the form of a letter from the Minister to the Chairman of the Regulatory Reform Committee did not explicitly accept any of the Committee's recommendations relating to parliamentary procedures (see paragraphs 40 to 45 below).

6. Our intention has been to produce our report in time to assist the House at the report stage of the Bill.

2 *A Bill for Better Regulation: Consultation Document*, p 5.

3 Legislative and Regulatory Reform Bill, Explanatory Notes, paragraph 5.

4 HC (2005-06) 878.

5 Q 2

2 Scope of the Bill

7. The central provisions of the first part of the Bill introduce a new power under which Ministers may make orders which amend primary legislation. This power replaces the powers in the Regulatory Reform Act under which RROs have been introduced.[6] The new power, however, is not subject to the constraints and restrictions which apply to RROs. In particular an order under the new power—

- need not have as its purpose the relief of specific burdens;
- is not limited to legislation which is more than two years old or has not been amended in the last two years;
- may confer upon Ministers or others a power to make further subordinate legislation under it;[7]
- may implement the recommendations of any of the United Kingdom Law Commissions.

Such an order may not—

- impose or increase taxation; or
- create a new offence punishable by, or increase the penalties for an existing offence so that it is punishable by, more than two years imprisonment on indictment, or on summary conviction imprisonment for a term exceeding the normal maximum or a fine exceeding level 5 on the standard scale, or authorise forcible entry or the compelling of evidence, unless the order implements the recommendations of one of the Law Commissions.

8. Before proposing an order, a Minister must also be satisfied that five preconditions have been met. These are that—

(i) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means;

(ii) the effect of the provision is proportionate to the policy objective;

(iii) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;

(iv) the provision does not remove any necessary protection; and

(v) 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.

6 The Bill repeals all the major provisions of the Regulatory Reform Act.

7 In the case of Ministers this power can only be exercised by statutory instrument subject to the negative procedure.

9. When a Minister presents a draft order to Parliament it must be accompanied by an explanatory document which, among other things, must set out why he believes that the preconditions have been met. The Regulatory Reform Committee considered how this procedure might in practice restrict the order-making powers in the Bill. They concluded—

> The rationality of those views [i.e. why the Minister believes that the preconditions have been met] is capable of being the subject of judicial review – not on the basis (which Parliament might apply) of whether the judge would have formed the same or different views but on the basis of whether they were within the range of views that a Minister acting reasonably might have formed. As in the case of any current RRO, a challenger would normally have an uphill struggle in demonstrating that a Minister had acted irrationally, particularly if the Committee had recommended the appropriateness of the order.[8]

10. The Committee proposed a range of amendments to the Bill, including three separate options for strengthening the parliamentary scrutiny of draft orders. Overall they concluded that the Bill 'has the potential to be the most constitutionally significant Bill that has been brought before Parliament for some years.' [9]

11. The Minister, however, argued in the second reading debate that the safeguards in the Bill were stronger than had been the case in the Regulatory Reform Act and that they preserved the proper role of Parliament—

> I have insisted that the formal preconditions on orders are retained or adapted to remove the narrow and technical concept of burdens. Indeed, those safeguards now apply comprehensively to capture all of the impacts imposed by orders. There is also a new safeguard—no order will be made where there is a better alternative to legislation[10]

> …the preconditions in the Bill are stronger than those in the 2001 Act. They have a wider application, applying to all types of provision made by order, not just to those affecting burdens. A Minister wishing to make an order under the new power must ensure that those stringent safeguards are observed.[11]

He also repeated the undertaking that he had made in his evidence to us that the Government would not seek to 'introduce anything highly controversial' by means of an order under the Bill and would not proceed with an order which the relevant committee in either House had recommended should not be proceeded with—

8 HC (2005-06) 878, paragraph 54.

9 HC (2005-06) 878, Summary.

10 HC Deb 9 February 2006 c1053.

11 HC Deb 9 February 2006 c1055.

> The relevant Select Committee would … operate a power of veto and the Government would be told to think again and seek an alternative legislative vehicle, if they were still minded to proceed with the suggestion.[12]

He gave similar undertakings to the standing committee on the Bill.

12. It is important to distinguish between the Government's intentions in introducing the Bill and the precise text of the Bill itself. The Minister repeatedly emphasised to us his desire to use the powers under the Bill in a consensual way to deliver amendments to the law 'to improve the UK's regulatory performance.'[13] He identified two particular initiatives to which the Bill would contribute. The first was what he referred to as the 'admin burdens project' which 'is seeking to analyse the global figure in the UK economy of administrative burdens on business and then, having identified that figure, for the first time ever setting targets for its annual reduction.' The second was the requirement which had been placed on every government department to 'come up with their own simplification plans of unnecessary bureaucracy, unnecessary admin burdens, outdated legislative arrangements.'[14] He also emphasised that the Bill 'was not about redrawing any constitutional arrangement.'[15]

13. The Bill as drafted, however, is not restricted to the purposes outlined by the Minister; neither is there the explicit provision of a power of veto for the relevant committee. There is no attempt to limit the order making power in terms of whether or not what is proposed is highly controversial. Instead, as the Regulatory Reform Committee put it, '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.'[16]

14. Orders may implement the recommendations, with or without amendment, of any one or more of the United Kingdom Law Commissions. Such orders are not subject to the restrictions in respect of criminal offences and forcible entry which we described in paragraph 7 above. Although in standing committee the Minister, speaking in support of this provision, argued that to remove it 'would mean that some well considered and worthwhile reforms recommended by the Law Commission after detailed research and extensive consultation could be implemented only by primary legislation,' he was sufficiently sympathetic to the amendments moved by Members seeking to remove the special status given to Law Commission recommendations to add—

> However, I believe that Law Commission recommendations that include criminal penalties above the levels specified in clause 6 and that are suitable for implementation by order are likely to be rare indeed. I also believe that where higher

12 HC Deb 9 February 2006 c1058.

13 HC Deb 9 February 2006 c1060.

14 Q5

15 Q6

16 HC (2005-06) 878, Summary.

penalties are recommended, they might well make the orders highly controversial and therefore inappropriate for delivery by order.[17]

Accordingly he undertook to consider the matter further. **We welcome this undertaking. The appropriateness of pursuing a proposal for legislative reform by means of an order under this Bill should be judged by its substance, not its source.**

15. The Bill explicitly provides that orders under it may amend private legislation. We asked the Minister if he could give some examples of how this power might be used. His response (in the form of a letter following the evidence session) offered only one example: an order to secure the winding up of the Covent Garden Market Authority and return of the market to the private sector.[18] Apparently such an order would be hybrid if it was introduced as a bill. In the standing committee the Minister raised the possibility of pursuing harbour revision orders through this means, thereby denying the possibility of a public inquiry.[19] The Standing Orders governing the procedures for hybrid and private bills are complex and the proceedings can be protracted, but their aim is to ensure that those individuals or bodies whose rights or interests are to be specifically removed or adversely affected by the bill (known as 'petitioners') have the opportunity to present their case to Parliament. **If the order-making powers in this Bill are to be used to amend private legislation it is essential that petitioners should continue to have the opportunity to present their case to Parliament before any such order is made. In our view this will require all such orders to be subject to the super-affirmative procedure and in many cases might also require extensions to the time limits provided under the Bill.**

16. We agree with the Regulatory Reform Committee that the Bill as introduced is *prima facie* of major constitutional significance. It was for this reason that our Chairman wrote to the Leader of the House requesting that Part 1 of the Bill be committed to a Committee of the Whole House. At Business Questions on the day of the Bill's second reading the Leader of the House said that he was still considering the request.[20] In the event, however, the Government persisted with the programme motion which it had previously tabled in connection with the Bill and which committed the Bill to a standing committee.

17. **We regret that the Government chose not to commit Part 1 of the Bill to a Committee of the Whole House. We agree with the Regulatory Reform Committee that as drafted the Bill is of major constitutional significance. It is a long-standing, and widely supported, convention that such Bills are taken in Committee of the Whole House. We are also concerned that the current programme motion allows only one day for report and third reading. The Minister undertook in the standing committee that he would bring forward amendments on a number of matters at report stage. Given the constitutional importance of this Bill, we believe that one day may not be sufficient for proper consideration at report. We recommend that the Government consider amending the programme motion to allow two days for report stage and third reading.**

17 Stg Co Deb ,Standing Committee A ,7 March 2006 c168-9.

18 Ev (p 53)

19 Stg Co Deb ,Standing Committee A ,28 February 2006 c64-72.

20 HC Deb 9 February 2006 c1013,

18. The procedural implications of the Bill will be directly influenced by its scope. The House will expect significantly greater and more elaborate procedural safeguards over the use of a new power whose scope represents a fundamental change in the way Parliament deals with legislation than over the use of a power which is no more than an incremental development of an existing and well-established procedure.

19. There are two particular procedural characteristics which distinguish the House's treatment of primary from its treatment of secondary legislation. Primary legislation is subject to consideration over several separate stages and is capable of being amended. Furthermore a Bill passes through the two Houses sequentially so that amendments made in one House can be considered by the other. Secondary legislation is debated once (generally in a standing committee on Delegated Legislation). It cannot be amended. It is then either approved without further debate (in the case of affirmative instruments) or allowed to continue in force with no further parliamentary proceeding (in the case of negative instruments). It is considered in parallel by both Houses in the same form.

20. The introduction of the super-affirmative procedure for RROs extended the procedures for secondary legislation so that they took on a little of the characteristics of the procedures for primary legislation. RROs are subject to two stages of consideration, firstly in the form of a proposal and secondly as a draft order. The Regulatory Reform Committee is charged with reporting to the House on each proposal and in doing so may recommend that it be amended before being introduced as a draft order. But the Government is not obliged to accept the Committee's amendments and the RRO is considered only once (as a draft order) by the House as a whole. Indeed, if the Committee agrees that the draft order should be made and does so without dividing, the question for its approval is put without debate. In fact there has not been a single debate to approve an RRO since the introduction of the Regulatory Reform Act in 2001.[21]

21. The present Bill not only proposes an enlargement of the scope of the order making power compared to the 2001 Act, it also provides that such orders may be made by negative or affirmative procedure in addition to the super-affirmative procedure described above to which all RROs are subject. The Bill provides that the Minister who introduces the draft order also recommends which parliamentary procedure it should follow. Either House may then require that it should be subject to a more demanding procedure instead. We consider this provision in more detail below.

22. The Government justifies the need for the Bill by reference to difficulties encountered in making progress with RROs and with securing parliamentary time for Law Commission bills. The Government's consultation document, *A Bill for Better Regulation*, suggested that greater speed of delivery would flow from allowing orders under the Bill to be made by affirmative or negative procedure.[22] The implication of this statement (which is repeated in three of the four questions on parliamentary scrutiny) is that the parliamentary procedures had led to significant delays in making RROs.

21 A debate on the Fire Safety Order was held in Westminster Hall during the Regulatory Reform Committee's consideration of the proposal, but the debate was not triggered by the Committee dividing on the draft order.

22 *A Bill for Better Regulation: Consultation Document,* July 2005, p21.

23. The Regulatory Reform Committee published in its report a table which set out how long each stage of every RRO had taken, from the launch of the public consultation to the making of the final order. The table distinguishes between the time taken by parliamentary and by non-parliamentary consideration of the RRO. It contains 27 RROs. The parliamentary proceedings of only one of those took more than 50 per cent of the total time, and of only seven (i.e. just over a quarter) more than 25 per cent of the total time. All of these orders, of course, were made under the super-affirmative procedure which is the most protracted of the parliamentary procedures provided in the Bill. Overall parliamentary scrutiny, including days when the House was in recess, accounted on average for less than 20 per cent. of the total time from the consultation to the order being made.

24. It might have been expected that the proportion of the total time taken by non-parliamentary proceedings would have declined over time as the Government became more familiar with the procedures for RROs. In fact the contrary has been the case; in respect of no order made since March 2003 (and 16 have been made) have the parliamentary proceedings taken more than 22 per cent of the total time. When he was challenged in standing committee on the relative lengths of time taken by the parliamentary and the non-parliamentary stages, the Minister said—

> It would not be appropriate to link the scrutiny period to the gestation period[23]

So we should emphasise that the figures quoted above do not include the time taken by the Government to decide on, draft and bring forward a proposal for an RRO before the launch of the public consultation.

25. We asked the Minister why he thought the Regulatory Reform Act had failed to meet its objectives. He gave two reasons. Firstly the definition of the burden to be relieved or reformed was too narrow: it had to be a legal burden and could not for example be an administrative burden.[24] We are not clear why it should be necessary to amend primary legislation to lift a non-legal, purely administrative burden. His second reason was that culturally there was little incentive for either politicians or civil servants to put effort into preparing an RRO. To be the head of a bill team was 'a position of some responsibility and prestige.' The same was not true of a person in charge of bringing forward an RRO.[25]

26. Failure to implement Law Commission recommendations has been similarly attributed to parliamentary difficulties. The Minister has blamed pressure on the legislative programme for the fact that on average those recommendations accepted by the Government take seven and a half years to implement.[26] More than ten years ago, however, the House introduced a Standing Order designed to accelerate the passage of Law Commission bills.[27] Since then just four Law Commission bills have been introduced. The most recent was the Trustee Delegation Bill [*Lords*] in 1999. It took a total of seven minutes

23 Stg Co Deb, Standing committee A, 7 March 2006 c224.

24 Q 4

25 Ibid

26 Stg Co Deb, Standing committee A, 7 March 2006 c167.

27 SO No. 59.

on the floor of the House (at report and third reading stages) and was passed without amendment.

27. **The Government has identified areas of legislative activity where progress has been slower than it, and others, would have liked. It has apparently decided that that progress will be accelerated by truncating the parliamentary scrutiny of the legislation. But it has not produced evidence that the delays and obstacles have been caused by that parliamentary scrutiny. If the tests required of an RRO were too restrictive, they could have been amended rather than abolished. Other problems such as Whitehall's cultural approach to regulatory reform will not be solved by this Bill.**

3 Parliamentary scrutiny

28. It is generally recognised that the Regulatory Reform Committee has done an excellent job in scrutinising RROs on behalf of this House. The Minister praised its performance on several occasions during his evidence to us.[28] It was clearly also his assumption that draft orders under the Bill would be scrutinised either by the Regulatory Reform Committee or by a successor committee with a similar order of reference.

29. We have already referred to the differences between the provisions of the Bill as currently drafted and what has been said by Ministers about how they plan to use those provisions. Orders under the Bill will not necessarily share the set of common characteristics which have distinguished RROs and which are reflected in the tests set out in paragraph (6) of Standing Order No. 141. It is perhaps not surprising, given the common underlying purpose of all RROs, that the Regulatory Reform Committee has built up considerable expertise, in both its Members and its staff. If the Government uses the powers in this Bill only in order to pursue its better regulation agenda, the same may be true of orders made under it.

30. But the Bill's provisions extend more widely. Orders to implement Law Commission recommendations may share no common characteristics with orders to improve regulation. And in the future there is nothing in the Bill to prevent a government bringing forward orders which have no connection with better regulation. It is not necessarily the case that the parliamentary scrutiny of such orders will be most effectively carried out by a committee modelled on the Regulatory Reform Committee. It may be, for example, that a departmental select committee would be better placed to consider a particular draft order. Such a committee may already have done work in the area covered by the draft order; it may have experience of the bodies to be affected.

31. The Bill as currently drafted refers to 'a committee of [each] House charged with reporting on the draft order.' These references occur in Clause 13, where it is that committee which may recommend a more demanding parliamentary procedure, and in Clause 16, where under the super-affirmative procedure, the Minister is required to have regard to any recommendations made by such a committee on a draft order. It appears from the Explanatory Notes to the Bill and from the evidence which the Minister gave to us that the Government sees these two references as being to the same committee. We are

28 E.g. Q 2

concerned that the provision that the recommendation as to procedure is made by the committee charged with reporting on the draft order may introduce an undesirable inflexibility.

32. As noted above, the order-making powers in this Bill are very wide in extent and are subject to very few restrictions as to subject matter. The Minister has given a number of undertakings in the standing committee which may lead to the Bill being amended at report stage. But these undertakings relate principally to the parliamentary procedures under the Bill and will not fundamentally affect the scope of the powers in it. **We do not believe that the parliamentary scrutiny of draft orders should necessarily be in the hands of a single committee responsible for all orders under the Bill rather than being discharged by whichever committee may have the relevant subject expertise, including the departmental select committee.**

33. As currently drafted it is not clear that the Bill would allow this. We do not believe that it is the Government's intention that the Bill should prevent Parliament from being able to amend its procedures for considering draft orders as experience of them develops so as to ensure that scrutiny is effective and proportionate.

34. Some safeguards over the use of the powers in the Bill, such as further restrictions on matters which may the subject of an order, could only be introduced by amendment to the Bill itself. Others, however, might equally well be introduced in Standing Orders, although we do not believe that it would be appropriate for a Standing Order to be directly contrary to a provision in a bill passed by the House. So, for example, we would not recommend the removal, by Standing Order, of the negative procedure as an option, if it were to remain as an option in the Bill itself.

35. There are some advantages to placing key safeguards in the Bill, even if they could also be made by Standing Order. The House cannot by resolution overturn a statutory provision, whereas it can, of course, amend or set aside a Standing Order in that way.[29] There are a number of Acts of Parliament which provide for Parliament to proceed in specific ways when considering certain types of business (for example the Parliament Acts 1911 and 1949, the Statutory Instruments Act 1946 and, of course, the Regulatory Reform Act 2001). But there are also strong arguments against including parliamentary procedures in legislation. These are arguments of principle—one of the historic privileges of Parliament is its control over its own proceedings[30]—and of practicality. It may well become apparent from the use of a particular parliamentary proceeding that it has certain shortcomings or inconveniences. If so, it is much easier to put those right if the proceedings are set out in Standing Orders than if they are in an Act of Parliament. In the case of this Bill, the parliamentary procedures are the same for both Houses, even though there may be good reasons to have different procedures in each House.

36. For example, the Bill Team Manager, Ms Kate Jennings, told us that the reason that the Bill did not provide a veto for the relevant committee 'was very much based on our understanding particularly in the House of Lords where committees advise the House and,

29 A statutory provision could, of course, be overturned by an order subject to negative procedure if the Bill is passed in its current form.

30 Erskine May, *Parliamentary Practice,* 23rd edition p103

therefore, it was not for us to say that the committee had a right of veto.'[31] In the Commons the decision of a committee cannot bind the House, and any such decision may always be overturned on the floor of the House, but that has not precluded committees from being given the power to make decisions on behalf of the House. The European Scrutiny Committee, for example, decides on behalf of the House which European Documents raise issues of sufficient political and legal importance that they should be referred to a European Standing committee for debate.

37. The Government has accepted that draft orders would only be subject to negative or affirmative—as opposed to super-affirmative—procedure where the policy content was sufficiently uncontroversial. The Minister also accepted that the relevant committees should be the judges of how controversial a draft order may be.[32] There is no reason why the mechanism by which they should do this could not be set out in Standing Orders. **We believe that the parliamentary scrutiny of orders under this Bill would be better provided for if Clause 13 were replaced with the straightforward provision that all draft orders would be subject to the super-affirmative procedure unless either (a) both Houses recommended that either the affirmative or the negative procedure should apply; or (b) either House determined that the draft order should not be proceeded with.**

38. It would be for each House to decide by what procedure it would meet these requirements. In the Commons they could be delegated by Standing Order to a successor committee to the Regulatory Reform Committee, even if the substantive scrutiny of the draft order itself was then undertaken by another committee.

39. We hope that the Government will accept this recommendation. If not, we plan to table a new clause to implement it for consideration at report stage. We hope that the House will support it. The remainder of this report addresses the parliamentary procedures in the Bill as reported from the standing committee. If the Government accepts this recommendation, many of our other recommendations would be implemented by Standing Order rather than by amendment of the Bill.

4 Parliamentary procedures in the Bill

Necessary safeguards

40. The Regulatory Reform Committee set out a range of safeguards which it believed should be included on the face of the Bill. These included—

- A parliamentary veto for the relevant committee in each House;
- Removal of negative procedure as an option;
- Further restrictions on matters which could be the subject of an order; and
- Extension of the 21 day limit for decisions on which procedure will be followed.

31 Q 42

32 Q 9

In all the report contained some 17 detailed recommendations. Mr Murphy appeared before us the day after the report was published and he was not then in a position to provide a substantive response to those recommendations—

> I am sure you would not expect me, Chairman, to have specific and detailed responses to the Select Committee's report which was published yesterday, but what I would say is that we think that many of those recommendations have a good deal of merit and we are minded to see just how we can take on board the specific suggestions made by the Regulatory Reform Select Committee.[33]

When he was asked when he expected to be able to respond to the recommendations, he gave this undertaking—

> I do not think it would be appropriate to go into the standing committee deliberations of this Bill not having produced a response, and, rather than saying a week, three days, ten days, I think in terms of the dynamic of Parliament, we have to have that produced in good time to allow the standing committee to reflect upon it.[34]

41. We suggested to him that it might take more time to give a considered response and asked whether in those circumstances he would consider postponing the standing committee to allow a proper response to be prepared. He replied—

> I do not anticipate that, and I have already had numerous conversations arising from the Regulatory Reform Select Committee report and recommendations and we are developing our response pretty quickly. We will be in a position whereby we will produce our response in good time in advance of the standing committee beginning its work.[35]

The Minister repeated that commitment during debate on the second reading of the Bill two days later.[36]

42. As we noted above, following the second reading a programme motion was agreed to under which the Bill was committed to a standing committee. Under that motion the standing committee proceedings were required to be concluded by 9 March. Because of the February adjournment, the first meeting of the standing committee was on 28 February.

43. The Minister's reply to the Regulatory Reform Committee's report was made in the form of a letter to the Chairman of the Committee. The letter was received by that Committee on 27 February. Members of the standing committee received copies on the same day. This was the day before the first meetings of the standing committee and thus after the last date on which amendments to be considered at the first two sittings could be tabled. The reply was made more widely available when, in response to a written question

33 Q 2

34 Q 16

35 Q 17

36 HC Deb 9 February 2006 c1056.

from the Chairman of the Regulatory Reform Committee, it was placed in the Library on 1 March.

44. The letter was accompanied by an annex which responded to the individual recommendations of the Committee. The letter described this annex as an 'initial response.' It restated the arguments in favour of the Bill as set out by the Minister in his evidence to us and in the second reading debate. It did not, however, include substantive answers to any of the Committee's specific recommendations to increase the safeguards in the Bill or to strengthen the parliamentary procedures. Instead it contained such phrases as—

> As the Bill enters Committee Stage, the Government will listen carefully to the views of Parliament and seek its support in achieving the right balance between powers and protection.
>
> The Government values the Committee's expertise in this area and will consult with stakeholders as the Bill receives scrutiny during its Parliamentary passage.[37]

45. Amendments to introduce the additional safeguards recommended by the Regulatory Reform Committee in terms of limitations on the purposes for which orders could be used or the subject matter which they could cover were tabled for consideration in the standing committee. None of them, however, was accepted by the Government or made by the standing committee. **We welcomed the Minister's statement to our committee that it would not be appropriate to go into the standing committee deliberations without the Government's response to the recommendations of the Regulatory Reform Committee but we were disappointed by the lack of substance in the response that was provided. We are also extremely concerned by the apparent unwillingness of the Government, certainly to date, to agree to additional safeguards being added to the Bill. We hope that this will be rectified at report stage.**

Choice of parliamentary procedure

46. Clause 13 of the Bill set outs the mechanism for determining which parliamentary procedure is to apply to a draft order. As noted above an initial recommendation is made by the Minister. That recommendation may be overturned if either House requires, within 21 days of the laying of the draft order, a more demanding procedure (ie affirmative or super-affirmative if the recommendation is for negative procedure; super-affirmative if the recommendation is for affirmative procedure). In each House this is done either by the House resolving that a different procedure should apply or by the 'committee of that House charged with reporting on the draft order' recommending that a different procedure should apply, unless that recommendation is rejected by the House by resolution within the 21-day period.

47. We have a number of concerns over these provisions—

37 Letter from Mr Jim Murphy, MP, Parliamentary Secretary, Cabinet Office, to Mr Andrew Miller MP, Chairman, Regulatory Reform Committee, Annex A.

- There is no power to reject a draft order which the committee or the House considers to be inappropriate (e.g. because it is 'highly controversial');
- 21 days is too short a time to allow proper consideration of what might be the appropriate procedure for what may well be large and complex draft orders;
- The 21 day period runs concurrently with the 40 and 60 day periods for further consideration of the draft, rather than being additional to those periods;

Power to reject

48. In response to the Regulatory Reform Committee's recommendation that the Bill should allow Parliament to veto the delivery of individual proposals by order, the Government stated—

> … we have reiterated two commitments – that highly controversial proposals are not appropriate for delivery by order, and that the Government will not force an order through in the face of opposition from the Parliamentary Scrutiny Committees, effectively giving the Committees a veto over individual orders.[38]

In his evidence to us the Minister described how a similar undertaking in respect of RROs had operated—

> One of the strengths of the 2001 Act … was that it allowed a proper working arrangement between whichever government minister and department and the relevant select committees. Through a process of evolution of what is controversial, highly controversial and what is reasonable, it allowed accommodation of stakeholder consultation, ministerial assessment and select committee recommendation to decide where the centre of gravity is on controversial or highly controversial and it is our sense that that is still the correct way to progress so that in time a select committee, government and stakeholders will effectively establish where the line is.[39]

49. It is not entirely clear in the Government response whether the undertaking was not to proceed in the face of opposition from the committee in either House or only in the case of opposition from both.

50. The Minister told the standing committee considering the Bill—

> we made a commitment … to include a veto in the Bill, and it is important that we do so. The Government will make a specific proposal based on that principle before we debate the issue on Report.[40]

He also undertook—

38 Letter from Mr Jim Murphy, MP, Parliamentary Secretary, Cabinet Office, to Mr Andrew Miller MP, Chairman, Regulatory Reform Committee, Annex A.

39 Q 10

40 Stg Co Deb, Standing committee A, 7 March 2006, c196.

> to discuss the matter with the relevant Front Benchers and with the Chairs of the relevant Select Committees in the House of Commons before we reach Report.[41]

51. In the debate in the standing committee the Minister was noticeably more sympathetic to the idea of a veto exercised by the relevant committee than to an amendment under which a draft order could not be proceeded with if more than 50 Members wrote to the Speaker objecting to it. He argued that it would not be appropriate 'to define what is highly controversial … by means of an arbitrary number of Members of Parliament.'[42]

52. Our Chairman has not yet had the discussions offered by the Minister. It seems to us at this stage that the Minister's commitment to a veto is a commitment to make explicit what has been the practice in dealing with RROs: if the Committee is opposed to a specific proposal being proceeded with under the Regulatory Reform Act, the Government will not proceed with it. **We believe that such a provision is a necessary addition to this Bill, but given the lack of other restrictions on the order-making power, we are not convinced that it is a sufficient provision.**

53. There are examples of categories of business in the House being able to be blocked by a certain number of Members (not necessarily a majority).[43] We have already commented on the breadth of the powers being taken by the Government under this Bill and on the need to distinguish between the text of the Bill and the Government's stated intentions under it. The Government has taken more far-reaching powers than it intends to use. Indeed the Minister has repeatedly undertaken that it would never use the full extent of those powers. Nonetheless they remain on the face of the Bill. They have not been reduced in standing committee and the Minister has given no commitment that they will be at report stage.

54. The membership of the committee, to which the Government is prepared to give a veto, will of course include a majority of government members. It is no reflection on the performance of the Regulatory Reform Committee in respect of RROs to question whether a veto given to its successor in respect of a Bill of much wider scope is sufficient protection against possible abuse. **We believe that there should be a power of veto which could be exercised outside the Committee as well as one within it. We do not, however, propose that the mechanism for exercising such a power should appear on the face of the Bill. Instead we recommend that the House should make it an instruction to the relevant committee to exercise its veto in respect of a particular draft order where certain conditions have been fulfilled.**

55. Those conditions could include that a certain number of Members have written to the Committee opposing the draft order and that they come from more than one party; or that the relevant departmental select committee has reported that the draft order should not be proceeded with.

41 Ibid

42 Stg Co Deb, Standing committee A, 7 March 2006, c197.

43 E.g. Standing Order No. 118 (4).

The 21-day period

56. The Bill requires the House to make a decision on the appropriate parliamentary procedure within 21 days of a draft order being laid. The Regulatory Reform Committee suggests that this period may have been chosen because by convention no statutory instrument will normally be brought into effect less than 21 days after being laid before Parliament. It goes on to recommend that the period should be extended to at least 30 days.[44]

57. Since the Bill provides that the committee's recommendation as to parliamentary procedure may be rejected by a resolution of the House, the committee would in practice have less than 21 days in which to reach its decision. We were told in evidence that 'it would be for the House to organise internally when it would require a committee to make its recommendations and to allow enough time for [a subsequent motion in the House].'[45] Given the Minister's statements as to the importance he would ascribe to the recommendation of the committee, we would expect such motions to be moved only very rarely. Equally we would expect the Government to consider the committee's recommendation very carefully before moving to overturn it. We would also expect such a motion to be debateable. The Government might reasonably argue that if it is to meet these requirements the committee would have to make its recommendation at least a week before the statutory deadline.

58. **We agree with the Regulatory Reform Committee that, at the very least, the period should be extended to 30 days. However, it may well be unrealistic to expect a committee to assess the policy implications and level of controversy of a long or complex draft order within 30 days. We note that the task of deciding whether a draft order should be subject to a more demanding parliamentary procedure will generally take longer and be more difficult than deciding whether a less demanding procedure should apply.**

Periods provided for parliamentary consideration

59. Before any draft order can be presented to Parliament, the Minister is required to undertake a period of public consultation. The terms of that consultation are governed by Clause 11 of the Bill. The Minister told us—

> There is a set time-frame for the statutory public consultation of course which is 12 weeks, whereby there is an expectation, well, it is more than an expectation, that the statutory consultation should conform to the 12-week minimum.[46]

60. Under the Bill, Parliament is to have 40 days to consider a draft order subject to the negative or affirmative procedure and 60 days for one subject to the super-affirmative procedure. We considered the relative proportion of the total time taken by parliamentary and non-parliamentary consideration of RROs in paragraphs 22 to 27 above, but it is worth

44 HC (2005-06) 878, paragraphs 61ff.

45 Q 41

46 Q 45

noting here that in respect of every RRO made since March 2003[47] the Government has taken more than 60 days to lay a proposal for an RRO after the conclusion of the consultation period.

61. As we noted above, the Government's consultation document, *A Bill for Better Regulation*, suggested that greater speed of delivery would flow from allowing orders under the Bill to be made by affirmative or negative procedure. We reject this argument and we note that in his evidence to us the Minister did not claim that negative or affirmative procedure might be chosen in preference over super-affirmative for reasons of urgency—

> … the timing and urgency is not the driver as to whether it is negative, affirmative or super-affirmative, but it is the policy content level of controversy which would drive that.[48]

62. The Minister was not receptive in the standing committee to amendments to extend the 40 day period provided for consideration of negative or affirmative procedure draft orders. He described such an extension as 'unnecessary' since it was always open to the Committee to recommend the super-affirmative procedure which would provide a 60 day period.[49] He opposed amendments to extend the 60 day period on the grounds that it 'would compromise the principle of proportionality, which hon. Members on both sides of the House support and which underpins these procedures.'[50] On the other hand he stated that, as had been the case with RROs, 'if Committees go beyond the 60-day limit—as they did for the fire safety and civil registration proposals—in practice, Departments will always wait until the Committees have reported before laying the second-stage order. We see no reason for a formal extension of the super-affirmative procedure.'[51]

63. We do not at this stage recommend an automatic extension of the 60 day period. The Minister undertook that—

> Varying the Committee's flexibility to scrutinise orders undergoing super-affirmative resolution procedure for more than 60 days could also be reviewed when any necessary changes to Standing Orders are discussed.[52]

We look forward to being involved in those discussions. An additional concern is that, if the Minister is correct in predicting that many more draft orders will be brought forward under this Bill than was the case under the Regulatory Reform Act, there is a risk that the Committee will be faced with the need to consider several at the same time and that may lead to delays.

47 And all but four made before that date.

48 Q 47

49 Stg Co Deb, Standing committee A, 7 March 2006, c224.

50 Ibid

51 Stg Co Deb, Standing committee A, 7 March 2006, c225.

52 Ibid

Amendments to draft orders

64. As we noted above, secondary legislation is not normally amendable. The Regulatory Reform Committee has proposed—

> in the case of super-affirmative instruments … the Houses or their committees should have the 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.[53]

There is no formal system for amending RROs, but on a number of occasions the committees have recommended amendments to proposals which have been accepted by the Government and incorporated into the draft order. It might be argued that that informal system would work equally well for draft orders under this Bill. The Minister, however, did not make this argument. Instead he told us—

> we will try and find a way in which that [i.e. a procedure for accepting amendments] can be enabled.[54]

65. We welcome this undertaking and will be interested to consider the Minister's proposals when they emerge. Our preference would for the legislation to contain a requirement that where the two Houses have agreed to identical amendments, the Minister may not proceed with an order unless it includes those amendments. It would then be for the two Houses to set out in their Standing Orders what would constitute agreement to an amendment to a draft order. Since draft orders will be considered by both Houses at the same time, it is unlikely that formal messages between the Houses would be an appropriate means of reaching agreement over the text of specific amendments. We would instead expect to rely on the continuation and extension of the existing excellent informal relations between the committees in both Houses. Under Standing Order No. 137A select committees in the House of Commons are, among other things, permitted to communicate their evidence to, and to meet concurrently with, any committee or sub-committee of the House of Lords. A reciprocal power is given to House of Lords committees.[55]

Standing Order changes

66. The Regulatory Reform Committee recommended various changes to Standing Order No 141 (Regulatory Reform Committee) and Standing Order No. 18 (Consideration of draft regulatory reform orders).

67. In respect of Standing Order No. 141 the Committee asked the House to consider what should replace the existing fourteen tests against which the Committee is required to assess each proposal for an RRO. Those tests reflect the regulatory character of RROs; they do not accurately reflect the powers in the new Bill. The Committee recommends that its successor should be required to assess draft orders against the preconditions in the Bill.

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53 HC(2005-06) 878, paragraph 60.

54 Q 55

55 Under Standing Order 68.

68. The Committee also recommends that Standing Order No. 141 should be amended so that its successor committee will be able to conduct 'inquiries into regulation more generally' and that therefore it should have 'the same powers as those granted to departmental select committees under S.O. No. 152.'[56]

69. Thus on the one hand the Committee proposes that its successor should no longer assess draft orders against the existing range of criteria which are explicitly designed to enable the Committee to judge to what extent a proposal contributes to regulatory reform, and on the other the Committee recommends that it should be given powers to enable it 'to undertake inquiries into regulation more generally.' These recommendations would give the Committee two distinct roles which seek to reconcile the inconsistency between the provisions of the Bill and the Government's declared intentions in respect of them.

70. Under the Bill as currently drafted there will be two stages to the Committee's consideration of a draft order. Firstly the Committee will have to decide whether to accept the Minister's recommendation as to parliamentary procedure or to recommend another procedure, or indeed that the draft order not be proceeded with. We have made a recommendations on how this should operate in earlier paragraphs. If the Minister does not bring forward an amendment to provide an explicit veto on the face of the Bill, we believe that it should be explicitly provided for in the Standing Order.

71. The second stage of the Committee's consideration will be into the substance of the draft order. It is right that at this stage the Committee should be required to assess the draft order against the five preconditions in the Bill. But the Committee should also assess the draft order's contribution to the Government's stated objectives for the Bill: the implementation of their 'ambitious agenda for better regulation.'[57] Some of the tests in Standing Order No. 141 (6) would continue to be relevant to such an assessment.

72. The Committee's second concern over Standing Order No. 141 is that it does not allow the Committee to report to the House on anything other than a proposal for, or a draft of, an RRO.[58] As noted above the Committee believed that it should be able to report from time to time on regulation more generally and drew attention to correspondence from the Leader of the House in support of this change. **We agree that the successor Committee should have this power. We recommend that, as well as reporting on regulation, it should also from time to time produce reports on the uses made by the Government of the powers in the Bill for purposes other than regulatory reform.**

73. Under Standing Order No. 18 a debate on a draft order is provided for only if the Committee has agreed that the draft order should be approved after a division. The Regulatory Reform Committee notes that under the Bill this may have the perverse effect of limiting opportunities for debate on the most significant orders (i.e. those subject to the super-affirmative procedure), while requiring debate on less important orders (i.e. those subject to the affirmative procedure).[59] **We agree, and recommend that the Standing**

56 HC(2005-06) 878, paragraph 78.

57 HC Deb 9 February 2006 c1060.

58 The Committee's assessment of the Bill was published as a Special Report.

59 HC (2005-06) 878, paragraph 83.

Order be amended to allow the Committee to recommend a debate on a draft order subject to the super-affirmative procedure without dividing. Indeed we would go further and recommend that, where the Committee is prepared to recommend the approval of a draft order which it nonetheless assesses to be both controversial and politically and legally important, it should be able to recommend a three hour debate.

74. While noting that amendments to the Standing Orders would not be his responsibility, the Minister was confident that the Government and the Leader of the House would want to consult us (as well as the Regulatory Reform Committee) on specific proposals. **We look forward to being involved in such consultations, and, if the Government accept our recommendations, would be very willing to prepare the amendments to Standing Orders needed to implement them.**

5 Conclusion

75. The purpose of this report is to assist the House in its consideration of the Bill at report stage and third reading. When we took evidence from the Minister before the Bill's second reading, we understood that he intended to respond positively to many of the recommendations of the Regulatory Reform Committee. He promised to publish a substantive reply to that Committee's recommendations before the Bill began its consideration in standing committee. We had expected him to bring forward amendments in standing committee to implement those recommendations which the Government accepted.

76. But no amendments have been made to Part 1 of the Bill in the standing committee. The Minister has repeated the assurances which he gave us in evidence and which he gave the House during the second reading debate. **We have not yet seen the amendments which he has promised for report stage. We do not believe that the fundamental concerns over the powers in this Bill to amend primary legislation by order, which have been raised by the Regulatory Reform Committee and which we share, can be addressed by ministerial assurances. The merits of any legislation must be judged by what its provisions state. The provisions of this Bill, as reported from the standing committee, do not provide adequate levels of parliamentary scrutiny over, or safeguards against the misuse of, the order making powers they contain.**

Conclusions and recommendations

Scope of the Bill

1. We welcome the Minister's undertaking to reconsider whether orders implementing Law Commission recommendations should be exempt from the restrictions on criminal offences and forcible entry in the Bill. The appropriateness of pursuing a proposal for legislative reform by means of an order under this Bill should be judged by its substance, not its source. (Paragraph 14)

2. If the order-making powers in this Bill are to be used to amend private legislation it is essential that petitioners should continue to have the opportunity to present their case to Parliament before any such order is made. In our view this will require all such orders to be subject to the super-affirmative procedure and in many cases might also require extensions to the time limits provided under the Bill. (Paragraph 15)

3. We regret that the Government chose not to commit Part 1 of the Bill to a Committee of the Whole House. We agree with the Regulatory Reform Committee that as drafted the Bill is of major constitutional significance. It is a long-standing, and widely supported, convention that such Bills are taken in Committee of the Whole House. We are also concerned that the current programme motion allows only one day for report and third reading. The Minister undertook in the standing committee that he would bring forward amendments on a number of matters at report stage. Given the constitutional importance of this Bill, we believe that one day may not be sufficient for proper consideration at report. We recommend that the Government consider amending the programme motion to allow two days for report stage and third reading. (Paragraph 17)

Parliamentary scrutiny

4. The Government has identified areas of legislative activity where progress has been slower than it, and others, would have liked. It has apparently decided that that progress will be accelerated by truncating the parliamentary scrutiny of the legislation. But it has not produced evidence that the delays and obstacles have been caused by that parliamentary scrutiny. If the tests required of an RRO were too restrictive they could have been amended rather than abolished. Other problems such as Whitehall's cultural approach to regulatory reform will not be solved by this Bill. (Paragraph 27)

5. We do not believe that the parliamentary scrutiny of draft orders should necessarily be in the hands of a single committee responsible for all orders under the Bill rather than being discharged by whichever committee may have the relevant subject expertise, including the departmental select committee. (Paragraph 32)

6. We believe that the parliamentary scrutiny of orders under this Bill would be better provided for if Clause 13 were replaced with the straightforward provision that all draft orders would be subject to the super-affirmative procedure unless either (a) both Houses recommended that either the affirmative or the negative procedure

should apply; or (b) either House determined that the draft order should not be proceeded with. (Paragraph 37)

Parliamentary procedures in the Bill

7. We welcomed the Minister's statement to our committee that it would not be appropriate to go into the standing committee deliberations without the Government's response to the recommendations of the Regulatory Reform Committee but we were disappointed by the lack of substance in the response that was provided. We are also extremely concerned by the apparent unwillingness of the Government, certainly to date, to agree to additional safeguards being added to the Bill. We hope that this will be rectified at report stage. (Paragraph 45)

Choice of parliamentary procedure

8. We believe that the provision to the relevant committee of a veto on further proceedings on a particular draft order is a necessary addition to this Bill, but given the lack of other restrictions on the order-making power, we are not convinced that it is a sufficient provision. (Paragraph 52)

9. We believe that there should be a power of veto which could be exercised outside the Committee as well as one within it. We do not, however, propose that the mechanism for exercising such a power should appear on the face of the Bill. Instead we recommend that the House should make it an instruction to the relevant committee to exercise its veto in respect of a particular draft order where certain conditions have been fulfilled. (Paragraph 54)

10. We agree with the Regulatory Reform Committee that, at the very least, the period within which the House may recommend a different parliamentary procedure should be extended to 30 days. However, it may well be unrealistic to expect a committee to assess the policy implications and level of controversy of a long or complex draft order within 30 days. We note that the task of deciding whether a draft order should be subject to a more demanding parliamentary procedure will generally take longer and be more difficult than deciding whether a less demanding procedure should apply. (Paragraph 58)

Amendments to Standing Orders

11. We agree that the successor to the Regulatory Reform Committee should have the power to report from time to time on matters other than proposals for and drafts of RROs. We recommend that, as well as reporting on regulation, it should also from time to time produce reports on the uses made by the Government of the powers in the Bill for purposes other than regulatory reform. (Paragraph 72)

12. We recommend that Standing Order No. 18 be amended to allow the Committee to recommend a debate on a draft order subject to the super-affirmative procedure without dividing. Indeed we would go further and recommend that, where the Committee is prepared to recommend the approval of a draft order which it

nonetheless assesses to be both controversial and politically and legally important, it should be able to recommend a three hour debate. (Paragraph 73)

13. We look forward to being involved in consultations with the Leader of the House on changes to the Standing Orders consequent on this Bill, and, if the Government accept our recommendations, would be very willing to prepare the amendments to Standing Orders needed to implement them. (Paragraph 74)

Conclusion

14. We have not yet seen the amendments which the Minister has promised for report stage of the Bill. We do not believe that the fundamental concerns over the powers in this Bill to amend primary legislation by order, which have been raised by the Regulatory Reform Committee and which we share, can be addressed by ministerial assurances. The merits of any legislation must be judged by what its provisions state. The provisions of this Bill, as reported from the standing committee, do not provide adequate levels of parliamentary scrutiny over, or safeguards against the misuse of, the order making powers they contain. (Paragraph 76)

Formal minutes

Tuesday 14 March 2006

Members present:

Mr Greg Knight, in the Chair

Mr David Anderson	Rosemary McKenna
Mr Christopher Chope	Sir Robert Smith
Mr David Gauke	Mr Rob Wilson
Andrew Gwynne	

The Committee deliberated.

Draft Report [*Legislative and Regulatory Reform Bill*], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 76 read and agreed to.

Summary agreed to.

Resolved, That the Report be the First Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That the Appendix to the Minutes of Evidence taken before the Committee be reported to the House.

[Adjourned until Tuesday 28 March at 4.00 pm

Witnesses

Tuesday 7 February 2006

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Mr Jim Murphy MP, Parliamentary Secretary, Cabinet Office, **Kate Jennings**, Bill Team Manager, Better Regulation Executive, and **Sarah Hulcoop**, Treasury Solicitors Ev 15

List of written evidence

Mr Jim Murphy MP (P 47, P 53) Ev 1, 26

Oral evidence

Taken before the Procedure Committee

on Tuesday 7 February 2006

Members present:

Mr Greg Knight, in the Chair

Annette Brooke	Mr David Gauke
Mr Christopher Chope	Sir Robert Smith
Ms Katy Clark	Mr Rob Wilson

Memorandum submitted by the Cabinet Office Better Regulation Executive

LEGISLATIVE AND REGULATORY REFORM BILL (P 47)

Introduction

1. The Procedure Committee has requested a memorandum from the Government on whether the existing parliamentary procedures for regulatory reform orders ("RROs") will continue to be appropriate given the wider order-making power which was discussed in *A Bill for Better Regulation: Consultation Document*, and which is now contained in clause 1 of the Legislative and Regulatory Reform Bill ("the Bill"). The Committee also asked about the responses received from consultees on the order-making power and the procedures relating to it, and whether any further changes were made to proposals as a result.

2. A summary of responses to the consultation exercise was published in December 2005. The Bill was introduced to Parliament on 11 January 2006.

3. This memorandum addresses the matter of procedures appropriate to the order making powers the Government is providing for. It is structured as follows:

- Background and the Better Regulation Agenda
- Overview of the Bill
- Appropriateness of RRO (super-affirmative) procedures for the delivery of reforms under the new order powers
- Rationale for the new proportionate procedures
- Functioning of the new procedures (including precedents and safeguards)
- Other issues.

The memorandum also includes the following annexes:

- Annex A includes a diagram illustrating the procedures provision contained in the LRRB
- Annex B contains information on other delegated powers examined by the DPRRC
- Annex C provides information about the use of the super-affirmative, affirmative or negative procedure in respect of Henry VIII powers other than those under the 2001 Act
- Annex D details the reforms previously delivered by Regulatory Reform Order which could have been delivered through affirmative or negative procedure
- Annex E details the types of measure potentially suitable for delivery via the super-affirmative, affirmative or negative procedure.

Background and Better Regulation Agenda

4. On 24 May 2005 the Chancellor of the Exchequer, Gordon Brown, launched a Better Regulation Action Plan to boost flexibility and enterprise. The objective of this was to set challenging targets to reduce the burden on business, charities and the voluntary and public sectors of administering regulations and achieve those targets by implementing the recommendations in the Hampton Review[1] and the Better Regulation Task Force ("BRTF") report *Less is More,*[2] which the Government has accepted. These recommendations included the identification of simplification proposals and the consideration of changes to the Regulatory Reform Act 2001 to allow delivery of a greater number of reforms via the order-making process.

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[1] *Reducing Administrative Burdens: Effective Inspection and Enforcement*, Philip Hampton, March 2005.
[2] Regulation—Less is More. Reducing Burdens, Improving Outcomes, Better Regulation Task Force, March 2005.

5. The agenda will deliver ongoing reductions in the total administrative burdens faced by business and a much clearer landscape of inspection and enforcement arrangements in the private and public sectors. It will require a step change in efforts, by departments, inspectorates and regulators. It will involve a rebalancing of efforts between regulation and deregulation.

6. To achieve the necessary reforms, departments are to prepare "simplification plans", setting out how they will meet targets to reduce administrative burden as well as wider simplification measures to deregulate, consolidate and rationalise regulation.

7. By Autumn 2006 all departments will have published agreed simplification plans that include proposals to reduce regulatory burden on businesses, charities, the voluntary and public sectors. HSE, Defra and DTI have already published initial plans for consultation.

8. Where simplification requires changes to primary legislation, the order-making powers contained in the Bill will automatically be considered as a possible vehicle for delivery. It is expected that, as a result, there will be a significant rise in the number of orders being brought forward, and that these orders will vary in size, complexity and relative levels of controversy.

9. In July 2005 the Government published the results of a review of the Regulatory Reform Act 2001 ("the 2001 Act"),[3] which examined the working of the Act and whether changes were necessary. The issue of procedures and their proportionality was explored as part of this review, along with the general need to reform the 2001 Act to cater for the anticipated step-change in reform. The proposal for a more flexible Parliamentary procedure, which would allow levels of parliamentary scrutiny to be proportionate to the nature of each order, was discussed in *A Bill for Better Regulation: Consultation Document* as part of a formal twelve-week consultation on proposals for change. This proposal received support from consultees. Details of the consultation and responses to it are outlined below, under *Rationale for New Procedures*. Following analysis of the responses to the consultation,[4] the provisions contained in the Bill were drafted.

Overview of the Legislative and Regulatory Reform Bill Provisions

10. The provisions in the Bill will do the following things:

- make it easier to amend, repeal or replace outdated, unnecessary or overcomplicated legislation (Part 1, Power to Reform Legislation etc);
- encourage a risk-based approach to regulation by requiring certain regulators to have regard to five principles of good regulation (Part 2, Regulators); and
- increase the transparency and reduce the amount of bureaucracy around the implementation of European Community law in the UK (Part 3, Legislation Relating to the European Communities etc).

11. This memorandum is concerned with the provisions concerning reform of Parliamentary procedures for orders contained in Part 1 of the Bill. The procedural requirements for the delivery of proposals by order set out in the Bill are as follows:

- appropriate consultation must be carried out on the Minister's proposals for an order. This includes consulting organisations and individuals substantially affected by the proposals, the Welsh Assembly and Law Commission where appropriate, and other relevant parties;
- when the Minister lays a draft order, he must provide an explanatory document to accompany it. Amongst other things, the document must contain the Minister's recommendation that either the negative, affirmative or super-affirmative resolution procedure should apply to the order, and his reasons for that recommendation; and
- either House (or a committee of that House charged with reporting on a draft order, if the House does not by resolution reject that committee's recommendation) can require a higher level of scrutiny than that proposed by the Minister, and the draft order will proceed according to the highest level of scrutiny required.

12. Further information on the provisions is contained in the Legislative and Regulatory Reform Bill and the Explanatory Notes which accompany it. The procedure provisions are dealt with fully in this memorandum.

Appropriateness of the Order-making Procedure for the Delivery of Reforms Under the New Powers

13. The Procedure Committee has asked the Government to consider whether the existing Parliamentary procedures for regulatory reform orders ("RROs") will continue to be appropriate for the new order-making powers given its wider scope.

[3] Review of the Regulatory Reform Act 2001, Cabinet Office, July 2005.
[4] *A Bill for Better Regulation: Summary of Consultation Responses*, Cabinet Office, December 2005.

14. The Government acknowledges that this is an issue that warrants consideration, given that the number and scope of proposals delivered by order is likely to increase with the introduction of the wider order-making power, which the Bill contains. This wider power will facilitate the successful delivery of a greater number and range of beneficial reforms.

15. The Government believes that the order-making Parliamentary procedures provided for in the Bill will be appropriate for delivery of reforms under the widened powers because they include a super-affirmative resolution procedure option, which can provide effective scrutiny for larger, more complex or more controversial reforms.

16. Currently, Section 8(2) of the 2001 Act states that a super-affirmative procedure will apply to all RROs. The Bill provides that a super-affirmative procedure will continue to be used, but only for certain orders. This change reflects the understanding that the super-affirmative procedure has proved to be appropriate for larger, more complex and more controversial proposals. The House of Lords Delegated Powers and Regulatory Reform Committee ("the DPRRC") has commented that: "Although we welcome the Government's commitment to greater use of the regulatory reform mechanism, our greater concern is that it should be applied to policy changes of some significance. The regulatory reform process is an onerous one and the importance of measures should, we believe, be proportionate to the effort and resources expended in satisfying its requirements."[5]

17. The super-affirmative resolution procedure as it applies to the RROs is indeed a thorough and an onerous one, and for this reason it is held to be sufficiently robust to ensure appropriate scrutiny of the larger and more complex reforms expected to be delivered under the provisions of the new Bill. Further details on this issue are provided in paragraphs 20 to 24 below. A diagram illustrating how the super-affirmative procedure would operate under the provisions of the Bill can be found at Annex A.

18. There are precedents for the delivery of complex measures by order under the existing super-affirmative resolution procedure. For instance, the Regulatory Reform (Fire Safety) Order 2005, which reformed over 50 pieces of legislation, was considered by the House of Commons Regulatory Reform Committee (the "RRC") to be one of the more ambitious proposals delivered under the 2001 Act. The order was nonetheless considered by the RRC to be appropriate for delivery by the RRO process.[6]

Safeguards

19. In comparison to other legislation subject to the super-affirmative resolution procedure, the 2001 Act and the Bill are subject to additional robust requirements. These requirements include a statutory requirement to consult (there is no such requirement for primary legislation) and conditions relating to the provision made by the order which the Minister must be satisfied about before making an order. These conditions include that the provision does not remove any necessary protection, and that it does not prevent any person from continuing to exercise any right or freedom he might reasonably expect to continue to exercise.

20. The super-affirmative procedure also provides for thorough scrutiny of proposals by expert Parliamentary Committees, flexibility for amendments where required by the Committees or in the light of representations (these amendments can be substantial) and voting on the proposals by both Houses of Parliament, informed by Committee recommendations.

21. The proposed extension to the RRC's remit will enable the Committee to consider orders under the new powers in the broader better regulation context, which should empower the Committee to consider the proposals in terms of the direct benefits they deliver and the burdens they remove from business and others. This approach, combined with the DPRRC's expertise in the area of delegated powers and appropriateness of procedures for their delivery, will ensure that valuable and effective Parliamentary scrutiny takes place.

22. The Government therefore considers that the super-affirmative procedure provided for in the Bill continues to be sufficient to ensure effective scrutiny of more complex measures that are expected to result from the wider powers. Ultimately, Parliament retains the right to reject proposals they deem inappropriate for delivery by order, as the RRC and DPRRC did in response to the proposed Civil Registrations (Births and Deaths) Order 2004. The Government has also reasserted its commitment not to use orders to deliver highly controversial proposals.[7]

Rationale for New Procedures

23. Under the 2001 Act, the same Parliamentary procedure applies to all orders. Precisely because the process is, as the DPRRC commented, an onerous one suited to measures of significant impact, alternative new procedures are provided for in the Bill, the rationale for which is set out below.

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[5] *1st Report of Session 2003–04. Special Report Sessions 200–02 and 2002–03: The Work of the Committee*, House of Lords Delegated Powers and Regulatory Reform Committee, December 2003.

[6] Proposal for the Regulatory Reform (Fire Safety) Order 2004, Eleventh Report of Session 2003–04 HC 684, House of Commons Regulatory Reform Committee, 2 August 2004.

[7] Uncorrected Evidence presented by Mr Jim Murphy MP, Parliamentary Secretary, Cabinet Office to the Regulatory Reform Committee on the Operation of the Regulatory Reform Act 2001 on 13 December 2005, published 19 December 2005 (HC 774-i).

24. In considering the Parliamentary scrutiny provided for under the 2001 Act, the review found that the current system had proved appropriate and thorough for large and complex proposals but burdensome for smaller reforms. All orders are currently subject to the super-affirmative procedure irrespective of their size or complexity, and orders can vary considerably in this respect. On this basis, the Government raised concerns that the detailed level of scrutiny was disproportionate for small or simple reforms. In 2002, the Government noted: "there may be circumstances where the procedures, taken as a whole, are too burdensome. For example, it may be that an expedited procedure would be appropriate for those that are simple, uncomplicated and command widespread support. It is our experience that some Departments are put off using RROs because of the time-scales and bureaucracy involved."

25. The Government believes that, although the super-affirmative procedure is appropriate for larger or more complex reforms, it can be disproportionately onerous for some smaller and simpler reforms. The Government wishes to maximise the benefit of the order-making process by also making it suitable for delivering worthwhile, albeit smaller-scale reforms.

26. The issue of encouraging proportionate levels of scrutiny of orders was explicitly addressed in *"A Bill for Better Regulation: Consultation Document"*. The consultation document invited consultees to comment on three questions:

— whether all orders should receive the same level of scrutiny, regardless of size or complexity;

— whether some orders could be delivered by a faster procedure; and

— the sorts of proposals stakeholders could envisage being delivered by a faster procedure.

27. A majority of respondents, particularly those from the business sector, agreed that all orders should not undergo the same level of Parliamentary scrutiny. The Co-operative Group commented: "Some form of differentiation would seem sensible to focus parliamentary attention where it was most needed." The Institute of Directors also stated: "RROs can vary tremendously in terms of their scope [. . .]. Clearly, those of greater significance should be subject to the more searching examination." The Regulatory Reform (Joint Nature Conservation Committee) Order 2005 RRO team noted that "the current scrutiny and administrative procedures are so onerous that they act as a disincentive for Departments. Any move to make scrutiny more proportionate can only increase the likelihood that a new Act would be more successful in contributing to regulatory reform programmes." Respondents (and particularly the business sector) were keen that, where reform is needed and straightforward, it should be delivered as quickly as possible.

28. The Dutch experience of reducing administrative burdens which is discussed in the Better Regulation Task Force report *Less is More: Reducing Burdens, Improving Outcomes* and the administrative burdens measurement exercise currently underway, demonstrate that individual administrative burdens may be small but that, taken together, their removal can make an important contribution to the Better Regulation Agenda. It is therefore also desirable that the order-making power should be used to make small-scale reforms as swiftly and effectively as possible. The BRTF has also commented that "we do not consider it proportionate, targeted or necessary for each RRO to undergo the same level of scrutiny. Large, complex RROs may require greater scrutiny, while smaller, less complex RROs should require less."

29. The Government considers that there is a clear difference between proposals such as the Regulatory Reform (Local Commissioner for Wales) Order 2004 which removed one burden, and the Regulatory Reform (Fire Safety) Order 2005, which simplified the entire fire safety regime for non-domestic properties (see above). Some RROs are so small that they attract little public attention, such as the Regulatory Reform (Museum of London) (Location of Premises) Order 2004, which made a two-line amendment to one Act and elicited only four consultation responses. Lord Evans has also commented on this issue, during debate on the Regulatory Reform (Execution of Deeds and Documents) Order 2005: "the order before us is not just the stuff of lawyers' law, it is the stuff of the minutiae of lawyers' law. Whatever the technical merits of the reforms contained in the order—and I think they are worth while—the order will not be turning the world upside down."[8]

30. The Government sees no reason in principle why departments could not consider what level of scrutiny might be appropriate for an order whilst developing its proposals.

31. The Government believes that measures proposed to be delivered via the order-making powers which are similar in scale and level of interest to other statutory instruments delivered by affirmative or negative resolution should be delivered by a comparably proportionate procedure. The choice of procedure should be based on the nature of the reforms proposed—on factors such as the size, complexity and relative level of controversiality of proposals.

32. It is believed that policy teams would make more use of the order-making power to deliver reforms if scrutiny, whilst still at the level required by Parliament, was tailored according to the dimension of the reforms being proposed, and could therefore deliver worthwhile smaller or less complex reforms more quickly.

[8] Lord Evans of Temple Guiting, debate on affirmative motion to approve Regulatory Reform (Execution of Deeds and Documents) Order 2005, Hansard 7 Jun 2005: Column 847.

33. The Government acknowledges that in the past the RRC has expressed concern about how more flexible procedures would function in practice, specifically anticipating "problems inherent in having to decide case-by-case on the appropriate procedures to be followed" and on providing certainty to the public regarding representations.[9]

34. Some respondents to consultation also expressed concerns that the standard negative or affirmative procedure would not provide an adequate level of Parliamentary scrutiny for proposals amending primary legislation. The new procedures detailed below seek to directly address these concerns by: building on departmental experience of recommending the appropriate degree of scrutiny for delegated legislation; ensuring that the minimum period of scrutiny is clear at the consultation stage—so that consultees are clear how long they will have to make representations; and by giving Parliament the final say over the appropriate level of scrutiny.

The Functioning of the New Procedures

Description of procedural options

35. The provisions concerning procedures included in the Bill are based on the principle that the appropriate procedure should be decided on a case-by-case basis depending on the content of the proposed reforms. A diagram outlining how the process will operate can be found at Annex A. In summary, the process is as follows:

- the Minister consults on the proposals states the degree of scrutiny (negative, affirmative or super affirmative) he considers to be appropriate (and if appropriate seeking views specifically on this issue)
- the Minister makes a recommendation in the explanatory document laid alongside the draft order, about the procedure he considers should apply to the draft order
- Parliament then has the opportunity to disagree with this recommendation by requiring that a more onerous procedure should apply. A period of 21 days is available for either House (or a committee of that House charged with reporting on a draft order, if the House does not by resolution reject that committee's recommendation) to require a higher level of scrutiny. Where this happens, the Minister has no choice about the eventual procedure which will apply: Parliament's wishes will always be implemented. In the event of each House requiring a different level of scrutiny, the most onerous of the two will apply.
- In some cases where a draft order has been laid and is scrutinised under the super-affirmative procedure, if both Houses are in agreement that the order should be approved with no amendment, a recommendation can be made that the order should be made immediately on the completion of 60 days' scrutiny by affirmative motion. The Government will make sure that interested stakeholders are aware that this outcome is a possibility so that they are clear about the period of time available for them to make representations.

36. There are precedents for a choice of Parliamentary procedure in section 2 (2) of the European Communities Act 1972, which allows for orders to be subject to either affirmative or negative resolution procedure.

37. In practical terms, aspects of this procedure can be likened to what happens when a Bill contains powers to make secondary legislation. Government departments provide memoranda setting out the details of the delegated powers provided for, recommendations on the choice and the appropriateness of parliamentary procedure and their justification for those recommendations. The DPRRC, drawing on its expertise in delegated powers, then reports on the appropriateness of the proposed procedure and, where necessary, recommends changes. Examples of delegated powers provisions the Committee has reported on are included in part a) of Annex B. The examples are purely to illustrate the way Parliament makes recommendations on appropriateness of procedures applying to delegated powers. These are not intended to be examples of the types of reforms that it is envisaged could be delivered by affirmative or negative order-making procedure. This issue is dealt with below in Annex C.

Determination of Which Procedure Should Apply

38. The nature of each proposed order will be examined by departments on a case-by-case basis when deciding which procedure to recommend and factors such as level of complexity, size and relative degree of controversy will be taken into account.

39. It is also considered that the level of procedure applicable to other statutory instruments (including RROs and other instruments made under Henry VIII powers) can provide useful precedents when deciding which level of procedure is most appropriate for an order under this Bill. As more orders are made, Departments will develop a better feel for the level of procedure likely to be considered appropriate by Parliament.

[9] *House of Commons RRC First Special Report 2004–05: "Operation of the Regulatory Reform Act 2001".*

40. Supporting information on delegated powers examined by the DPRRC, including Henry VIII powers, are set out in Annex B. Examples of Henry VIII powers subject to affirmative or negative resolution procedure are an Annex C. Examples of reforms previously delivered by RRO which could have been delivered by negative or affirmative procedure are at Annex D. Generic examples of the types of measure that are considered to be potentially suitable for delivery through super-affirmative, affirmative or negative resolution are set out at Annex E.

Safeguards

41. There are both substantive and procedural safeguards which apply to orders made under the Bill. There are rigorous documentary requirements which must be complied with by a Minister who intends to make an order and this will ensure that sufficient information (for example on the nature of the proposals, their impact and justification of the choice of procedural route) is available to Parliament in order to assist them in reaching a decision about the appropriate procedure for a particular order. Of particular significance is demonstration that the preconditions that no provision of an order may remove any necessary protection or prevent any person from continuing to exercise any right or freedom which they might reasonably expect to continue to exercise have been met.

42. Proposals for orders will also be subject to thorough consultation, in which the minimum period of scrutiny that is proposed will be made clear to stakeholders so that they are aware of how much time is available for representations. Because the provisions of the Bill mean that the period of Parliamentary scrutiny can only ever be lengthened from 40 to 60 days, rather than decreased, stakeholders who may wish to make representations to Parliament will be in no doubt about the minimum period of time available to them to do so. In their consultation response, the BRTF commented that "we fail to see how the effectiveness of consultation or the protection of safeguards would be detrimentally affected if some Orders were delivered by faster procedures."

43. In addition, the Government has stressed its commitment not to put forward any highly controversial proposals for delivery by way of an order under the Bill: once a decision has been taken regarding whether a measure is suitable for delivery in an order under this Bill, a second decision on the appropriate Parliamentary procedure will be taken based on factors such as size, relative complexity and level of controversy. Ultimately, if Parliament does not agree with the level of procedure recommended by the Minister, then it effectively has a veto which it can exercise in order to prevent this procedural route from applying, in much the same way as it has the right not to approve an order at all.

Committee Reporting

44. The Government believes that the procedures provided for in the Bill will not adversely affect the relevant Parliamentary Committees' ability to report to the House on proposed orders.

45. The Committees would continue to report on draft orders which are to undergo the super-affirmative resolution procedure in the same way that they are currently reported on.

46. In the case of orders which start out being dealt with under the negative or affirmative resolution procedure, either House or the relevant Committees would have the option of requiring within 21 days that a more onerous procedure should apply. For orders where Parliament does not require super-affirmative resolution procedure to apply, it is expected that the relevant Committees would carry out a function similar to that of other Parliamentary Committees which report on statutory instruments, such as the Joint Committee on Statutory Instruments, the House of Commons Select Committee on Statutory Instruments and the House of Lords Select Committee on the Merits of Statutory Instruments.[10] Thus effective scrutiny would continue for these proposals. This would not be a new role for the DPRRC and the RRC, which already carry out functions similar to the above mentioned parliamentary committees in relation to RROs.

47. Parliament does not need to complete scrutiny of all aspects of the order within the 21-day period. By the end of this period Parliament needs only to have made its decision as to the level of procedure which is appropriate to the order; it does not at that stage need to have completed its more in-depth consideration of the order and its impacts. The minimum time period available to Parliament to consider orders in full is 40 days for negative or affirmative procedure and 60 days for super-affirmative procedure.

[10] The Lords Select Committee on the Merits of Statutory Instruments examines certain instruments to determine whether the attention of the House should be drawn to those instruments, as specified in its Terms of Reference. Although not required to by its Terms of Reference, the Committee generally reports within 15 days of the orders being laid before parliament.

Other Issues

Procedural Treatment of Orders Amending Legislation Resulting from Private or Hybrid Bills

48. *A Bill for Better Regulation: Consultation Document* invited consultees to comment on two issues concerning the amendment of private and hybrid legislation by order: whether it should be possible to reform private and hybrid legislation by order as part of a wider reform package; and, if so, whether respondents considered that additional safeguards should apply.

49. The majority of respondents were in favour of amending hybrid and private legislation by order. Several respondents also emphasised the need for effective safeguards in order to protect the interests of those affected by the order. For example, the Law Commission proposed that "the 'petitioner' should be entitled to have their case presented in the consultation document (together with the government's response) and consultees should be specifically asked to consider the issues raised."

50. In light of support expressed during consultation, the Government resolved that it should be possible to amend hybrid or private legislation by order and that, if a draft order proposes to amend legislation that resulted from a private or hybrid bill, the same method for determining which of the three levels of Parliamentary scrutiny is appropriate for an order should apply. As mentioned above, the Bill requires consultation. We would expect that complying with the statutory duty to carry out appropriate consultation would mean consulting the original petitioners where they continue to be affected by the legislation. In addition, the relevant Parliamentary Committees will be able to call witnesses to give representations where this is necessary, as is currently the case under the 2001 Act. Resulting the light of these safeguards, the standard procedures provided for in the Bill should be adequate for consideration of proposals involving legislation stemming from private or hybrid bills.

Treatment of Orders Containing Provision for Sub-delegation of Legislative Powers

51. The review of the 2001 Act found that the absence of a power to create new secondary legislative powers (sub-delegation) had caused difficulties for RRO proposals in the past. Proposals to provide for full powers of legislative sub-delegation were consulted on in *A Bill for Better Regulation: Consultation Document*.

52. The majority of respondents agreed that orders should be able to provide for legislative sub-delegation. This power is therefore provided for in the Bill.

53. On the issue of adequate parliamentary scrutiny, the Institute of Directors stated that "the safeguards should be more than enough to ensure that this power is not abused". However the Law Commission believed that safeguards such as explanation of any such powers proposed in orders and why they are necessary, sunset clauses where appropriate and thorough scrutiny would be necessary to accompany such a power In their First Special Report 2004–5: Operation of the Regulatory Reform Act 2001, the RRC also commented that "significant safeguards for the exercise of the power" would be necessary.

54. Orders containing provision for sub-delegation of legislative powers will be subject to a resolution procedure proportionate to the scale of the power in question. The explanatory document for any such order must identify and give reasons for any power to legislate conferred by the order and the procedural requirements attaching to it. It is anticipated that in such cases the relevant committees will again perform a role similar to that performed by the DPRRC in relation to delegated powers contained in Bills (as described above) and will consider and make recommendations about the appropriateness of the procedures that are proposed to apply to the exercise of the power to legislate.

55. The Bill specifies that the explanatory document laid before Parliament must explicitly identify any powers conferred by the proposed order to make subordinate legislation, and the procedural requirements attaching to those powers, and must give reasons for the conferral of those powers and for the choice of procedural requirements. In response to concerns expressed during the consultation, the Government has agreed to publish draft regulations alongside orders as far as possible, and to justify why this is not possible or appropriate where that is the case.

Conclusion

56. For the reasons set out above in the section entitled *Appropriateness of the Order-Making Procedure for the Delivery of Reforms under the New Powers*, in particular the appropriateness of the more onerous super-affirmative procedure for larger or more complex reforms, or those attracting the most interest in terms of levels of controversy, the Government believes that the super-affirmative resolution procedure will continue to be suitable for the scrutiny of large or complex orders, or those of greater relative controversy, brought forward under the new powers.

57. The Government also believes that as a wider range of proposals, including smaller, simpler orders attracting less interest, is expected as a result of the powers contained in the Bill, a flexible system of procedures allowing for more proportionate scrutiny of orders is desirable (see the section entitled *Rationale for New Procedures*, above).

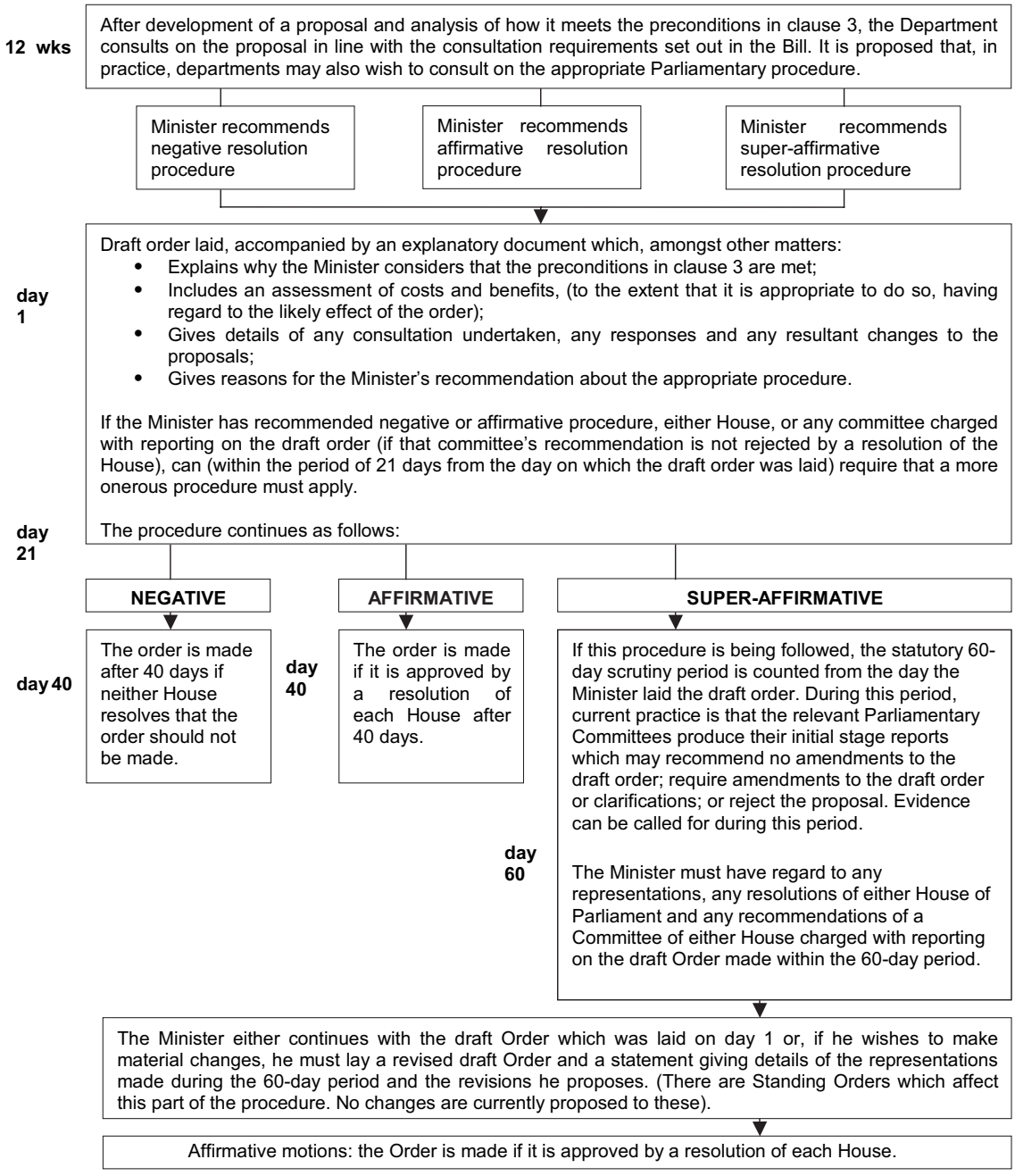
58. The Government believes that a system of case-by-case determination of appropriate procedures, combined with use of Parliamentary Committees' expertise in deciding the appropriate level of scrutiny, and account being taken of precedents built up over time would be a pragmatic, flexible approach to scrutiny of draft orders under the new powers (see section entitled *the Functioning of New Procedures)*.

59. Government recognises that procedures for orders amending primary legislation should not be decided lightly and, in recognition of this, has provided that Parliament should always have the final veto over whether the procedures recommended by the Government are appropriate.

ANNEX A

Diagram illustrating how the procedures contained in Legislative and Regulatory Reform Bill are expected to operate in practice

This diagram reflects both the requirements set out in the Bill and current and proposed practice relating to consultation, as well as parliamentary procedure.



Annex B

EXAMPLES OF OTHER DELEGATED POWERS EXAMINED BY THE DPRRC AND THE PROCEDURES HELD TO BE APPROPRIATE FOR THEIR DELIVERY

This annex is intended to be purely illustrative of how Parliament currently makes recommendations on the appropriateness of powers applying to delegated powers. The examples are not intended to be examples of the types of reforms envisaged for delivery under the order-making power. The examples given include Henry VIII powers and other delegated powers.

Human Tissue Act 2004

The Delegated Powers and Regulatory Reform Committee considered delegated powers in the Human Tissue Bill in their 25th Report of Session 2003–04.

The Act is primarily concerned with the storage and use of whole bodies, body parts, tissue and organs ("relevant material") for a range of purposes, including transplantation, research, anatomical examination, post-mortem examination, and the purpose of public display.

The Bill contained 27 delegated powers to make orders or regulations. The Department provided that all of the powers that could be described as "Henry VIII" powers should be subject to the affirmative procedure. Examples of powers subject to affirmative procedure are as follows:

— The Anatomy Act 1984 provided that bodies (with the appropriate consent as described in the Act) can be stored for three years, and certain material removed from bodies for longer periods. The Bill provided the Secretary of State with power to amend the purposes for which material can be stored and used (affirmative procedure, Henry VIII power);

— Power, by order, to add to the activities within the regulatory remit of Human Tissues Authority (affirmative procedure, Henry VIII power);

— Power, by regulation, to add, remove or alter the description of activities for which a licence is needed (affirmative procedure, Henry VIII power);

— Power to make regulations specifying ethical approval requirements for anonymised research that is exempted from the requirement for appropriate consent (negative procedure, power to create regulations).

The DPRRC considered most of the 27 powers to be appropriately delegated and subject to an appropriate level of Parliamentary scrutiny, but drew the attention of the House to one power the exercise of which was not subject to any Parliamentary procedure, made recommendations on the level of parliamentary procedure for one power, and recommended that, if possible, there should be criteria for the exercise for another on the face of the Bill.

Pensions Act 2004

The DPRRC considered some of the delegated powers provided in the Pensions Bill in their 21st Report of Session 2003–04.

The Act deals with a number of different matters relating to pensions, such as regulatory provision, minimum funding requirements, financial planning and pensions protection funds among other things.

The Bill contained a significant number of delegated powers provisions, for example:

— Henry VIII power to amend Schedule 2 of the Act (a list of functions of the Determinations Panel, a body exercising pensions regulatory functions). The provision provided a power to add, omit or alter functions by negative procedure. The Department for Work and Pensions' delegated powers memorandum explained that "The negative resolution procedure is appropriate as any amendments introduced via regulations will relate purely to the Regulator's internal operational arrangements." The Committee did not disagree with this recommendation.

— Henry VIII power to alter Chapter 4 of Part 4 and Chapter 5 of the Pension Schemes Act 1993 (which cover protection for early leavers, transfer values and protection for early leavers, cash transfer sums and contribution refunds) in their application to an occupational pension scheme in relation to which a freezing order is made containing a direction under section 21(4)(f) (no transfer of members' rights etc from the scheme). The Department for Work and Pensions' delegated powers memorandum explained that "The negative resolution procedure is appropriate as the regulations need to cater for the wider variety of circumstances when a freezing order contains additional specific directions, which conflict with obligations on schemes contained elsewhere in pensions legislation." The Committee did not disagree with this recommendation.

— The Committee considered the power to require financial support for a scheme if it is insufficiently resourced, and commented on the regulations subject to negative procedure which cover the percentage of the notional debt the employer must have assets to meet and the method of calculating net assets as part of the definition of insufficiently resourced. The Committee

considered whether these should be subject to affirmative procedure as opposed to negative procedure, as they held them to be important powers which can determine when a financial support direction can be given, but concluded that the negative procedure provided for by the Department was sufficient given the limited scope and clear principle of the powers.

Asylum and Immigration (Treatment of Claimants, etc) Act 2004

The DPRRC considered some of the delegated powers provided for in the Asylum and Immigration (Treatment of Claimants, etc) Bill in their 12th Report of Session 2003–04.

The Act contains a range of measures intended to unify the immigration and asylum appeals system, deal with undocumented arrivals, deal with situations where another country is best placed to consider an asylum or human rights claim and enhance the powers of the Office of the Immigration Services Commissioner.

The Bill contained 9 delegated powers proposals, for example:

— Power to prescribe States which are to be deemed Member States for the purposes of section 25 of the Immigration Act 1971 to allow for changes to the signatories to the Schengen acquis (negative procedure).

— Power to introduce regulations specifying a manner of notification to allow for flexibility, for example the possibility of notification of an immigration decision for example by post or in person or to a representative.

— Power to vary the certification period by regulations: a provision concerning the conditions for disentitling failed asylum seekers with family from state support. A condition existed that 14 days must have elapsed since the person being disentitled received a certificate from the Secretary of State notifying that support is to be withdrawn. A power was provided to allow the ability to alter the period of 14 days. The Home Office's delegated powers memorandum recommended that negative procedure should apply. However political sensitivity led the Committee to recommend affirmative procedure, stating: "We are aware of the sensitivity of issues connected with this provision, both in terms of the individuals affected and the public interest. We therefore recommend that, in this instance, the affirmative procedure provides the appropriate level of Parliamentary scrutiny".

Constitutional Reform Act 2005

The DPRRC considered some of the delegated powers provided for in the Constitutional Reform Bill in their 10th Report of Session 2003–04.

The Act's principal provisions abolish the office of Lord Chancellor and make other provision for the exercise of the Lord Chancellor's functions (Part 1); create the UK Supreme Court (Part 2); and make new provision for judicial appointments in England and Wales (Part 3).

The Bill contained 19 provisions concerning delegated powers, for example:

— A Henry VIII power at clause 65 to change, insert or remove references to appointment functions in other legislation, relating to the Judicial Appointments Commission. Two types of procedure were recommended to reflect that one sort of amendment will make "substantial" additions to power of the body whereas the second concerned consequential updating amendments. In the Department of Constitutional Affairs' delegated powers memorandum, they explained that: "There are two different procedures here because there are two types of amendment provided for in clause 65. The power in subsection (3)(a) and (b) allows for substantive additions to the powers of the Judicial Appointments Commission and potentially of the Secretary of State for Constitutional Affairs. It is right that this be subject to the affirmative resolution procedure to ensure proper scrutiny by Parliament. The second procedure relates to amendments that are purely consequential on the abolition or change of name of an office, where the references would otherwise become obsolete or out of date. It is appropriate that such orders should be subject to the negative resolution procedure".

— In their report the Committee commented on the power at clause 87 to allow regulations providing for the procedures in connection with alleged misconduct by judicial office holders to be made by rules subject to no parliamentary procedure. The Committee recommended that the clause should explicitly apply only to minor and purely procedural provisions.

— The Committee also commented on Henry VIII powers at clause 98 and Schedule 10, recommending affirmative procedure instead of negative procedure for clause 98(2)(b) which allows existing enactments to be amended or repealed, and recommending to the House that it consider asking the Government for clarification on the possibility of the power of Schedule 10 exercised in a way that would distort the composition of the Commission for political or other ends.

Annex C

USE OF SUPER-AFFIRMATIVE, AFFIRMATIVE OR NEGATIVE PROCEDURE IN RESPECT OF HENRY VIII POWERS OTHER THAN THOSE UNDER THE 2001 ACT

The following are examples of other Henry VIII Powers which make use of super-affirmative, affirmative or negative procedure:

European Communities Act 1972

The power: section 2(2) provides a power for designated Ministers to make regulations for the purpose of implementing European Community obligations and related matters. Regulations may do anything which may be done by Act of Parliament, including repealing or amending primary legislation.

Limitations: Ministers must be designated by Order in Council in relation to the general subject matter of the regulations. The power is also subject to specific limitations set out in Schedule 2: regulations may not impose or increase taxation, may not be retroactive, may not confer powers to legislate and may not create new criminal offences above a prescribed ceiling.

Procedure: negative or affirmative procedure, at the discretion of the department.

Orders made through negative procedure

1. *The Medicines (Provision of False or Misleading Information and Miscellaneous Amendments) Regulations 2005*

The Order creates new regulations relating to the provision of information on medical products (meaning any medical product for human use that has been derived or manufactured from a biological substance). The Order creates new criminal offences for failure to provide information relating to medical products.

2. *Environmental Protection: The Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2005 (No 2748)*

The Regulations set out penalties for the contravention of hazardous substances in electrical/electronic equipment regulations.[11]

3. *Wildlife: The Control of Trade in Endangered Species (Enforcement) (Amendment) Regulations 2005 (No 1674)*

The Regulations increase penalties for breaches of regulations controlling trade in endangered species.

4. *Agriculture, England: The Energy Crops Regulations 2000 (3042)*

The Regulations provide for financial assistance to producers of energy crops, upon approval of their application for such assistance.

5. *Petroleum: The Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 (No 1754)*

The Regulations create penalties for unlawful treatment of habitats, plants and animals.

National Health Service Act 1977

The power: Section 84B empowers the Secretary of State to make intervention orders providing for the removal from office or suspension of members or employee members of health authorities and trusts and for their functions to be exercised by other persons. An order may provide that any provision of the National Health Service and Community Care Act 1990 or the Health and Social Care Act 2001 may be modified in its application to the body in question for the duration of the order (section 84B(8)).

Limitations: the power to modify primary legislation is exercisable only in relation to two specified statutes and in relation to the body which is the object of the order. The modification lasts only for the duration of the order.

Procedure: negative resolution.

Human Rights Act 1998

The power: Section 10 and Schedule 2 empower Ministers of the Crown by order to take remedial action to amend legislation where a provision is found to be incompatible with a Convention right. The power includes a power to amend primary legislation. Remedial orders may have retroactive effect and may provide for the delegation of specific functions.

[11] These regulations do not come into force until July 2006.

Limitations: the Minister making the order must consider that there are compelling reasons for acting and explain these reasons to Parliament. He may only amend legislation to the extent he considers necessary to remove the incompatibility.

Procedure: super-affirmative, ie a document containing a draft of the proposed order and an explanation of the incompatibility and of the reasons for proceeding under section 10 must be laid before Parliament and remain there for a period of 60 days during which representations about the order may be made. At the end of the 60-day period, the Minister must lay before Parliament a statement containing a summary of any representations made and details of any changes made to the draft order. Approval by resolution of each House of Parliament must then be obtained before the order can be made. In urgent cases, an order may be made without being approved in draft, but in such cases the order will lapse if not approved by each House within 120 days.

Health Act 1999

The power: Section 60 and Schedule 3 empower the Queen by Order in Council to regulate or modify the regulation of any health care or related profession. The power includes the power to amend or repeal any enactment, to provide for the delegation of functions and the charging of fees.

Limitations: the power is concerned with the regulation of the health care professions, notably those regulated by specified Acts of Parliament. Schedule 3 specifies the kind of matters which are generally within the scope of an order, eg education and training, standards and conduct. It also specifies a number of matters which are outside the scope, eg it imposes restrictions on the abolition of regulatory bodies. An order may not create new criminal offences above a specified level.

Procedure: affirmative resolution. Before laying the draft, the Secretary of State must first publish a draft and allow 3 months for representations from representatives of the profession to be regulated. When laying the order, he must provide a report about the consultation to Parliament.

Local Government Act 1999

The power: Sections 16 and 17 empower the Secretary of State by order to make provision to facilitate compliance by "best value" authorities with the requirements of Part I of the Act (which among other things sets out the duties of best value authorities). The power includes power to modify an enactment.

Limitations: the power can only be used to modify an enactment which prevents or obstructs compliance with the requirements of Part I.

Procedure: super-affirmative, including mandatory consultation with affected persons and interests.

Local Government Act 2000

The power: Section 5 empowers the Secretary of State by order to amend, repeal, revoke or dis-apply any enactment where he thinks that it prevents or obstructs local authorities from exercising their power under section 2(1) (ie the general power to promote the economic, social or environmental well-being of their area). Section 6 empowers him to amend, repeal, revoke or dis-apply any enactment which requires a local authority to prepare, produce or publish any plan or strategy relating to any particular matter.

Limitations: the powers may only be used for the specified general purposes. In addition, the section 6 power may only be used if the Secretary of State considers that it is not appropriate for the enactment in question to apply to the authority, or that the enactment should be amended so that it operates more effectively in relation to the authority.

Procedure: super-affirmative, including mandatory consultation.

Local Government Act 2003

The power: Sections 97 and 98 empower the Secretary of State by order to amend, repeal, revoke or dis-apply an enactment which prevents or obstructs "best value" authorities charging by agreement for the provision of services or conducting commercial activities, or which makes provision for or in connection with the power to charge for services.

Limitations: the powers may only be used for the specified purposes.

Procedure: super-affirmative, including mandatory consultation.

Civil Contingencies Act 2004

The power: Section 20 empowers the Queen in Council or a senior Minister of the Crown to make emergency regulations if satisfied that the conditions in section 21 are satisfied. These conditions are that an emergency has occurred, is occurring or is about to occur and that the need to deal with it is urgent. Emergency regulations may make any provision which the person making them is satisfied is appropriate for the purpose of dealing with the emergency, and may make any provision which may be made by Act of Parliament, including the modification of an enactment.

Limitations: the powers are only available to respond to an emergency, as restrictively defined in section 19(1)–(4). The person making the regulations must be satisfied that the provision made is appropriate for the purpose of dealing with the emergency and that the effect of the regulations is proportionate. Emergency regulations must be prefaced by a statement by the person making them that he is satisfied that the conditions in section 21 are met, that the regulations meet the requirements of appropriateness and proportionality and that they are compatible with Convention rights. There are other miscellaneous restrictions, eg on the creation of offences. Regulations may not impose military service or prohibit strikes or industrial action; nor may they amend the Human Rights Act 1998 or the part of the Civil Contingencies Act dealing with the power to make emergency regulations. Emergency regulations lapse automatically no later than 30 days after their making, although this does not prevent the making of new regulations.

Procedure: emergency regulations must be laid before Parliament as soon as practicable after making and lapse 7 days later unless during that period both Houses of Parliament pass a resolution approving them. If Parliament does not approve the regulations, they lapse. If both Houses pass a resolution that the regulations shall have effect with a specified amendment, they shall continue to have effect subject to that amendment.

Electronic Communications Act 2000

The power: Sections 8 and 9 empower the appropriate Minister by order to modify legislation (including primary legislation) for the general purpose of authorising or facilitating the use of electronic communications or electronic storage and for one or more specified purposes, such as the doing of anything which must be done by writing or by post.

Limitations: the power may only be used for the specified general and specific purposes. The Minister may not make an order authorising the use of electronic communications or storage unless he considers that the extent to which records will be available under the electronic regime will be no less satisfactory than in other cases.

Procedure: negative or affirmative resolution, at Department's discretion. The Electronic Communications Act is designed to further the Government's policy aims of facilitating electronic commerce and of making Government services available electronically. The purpose of the Act is to help regulate and build confidence in electronic commerce by providing a scheme for registering cryptography services (such as electronic signatures). The Act also contains provisions to update procedures for modifying telecommunications licences.

Orders made under the Act include:

1. *The Education Act 1996 (Electronic Communications) Order 2004.*

The Order authorised all documents under the 1996 Act to be communicated by electronic means, including information given to parents.

2. *Social Security (Electronic Communications) (Carer's Allowance) Order 2003.*

The Order authorised use of electronic communications information relating to carer's allowance.

Annex D

REFORMS PREVIOUSLY DELIVERED BY REGULATORY REFORM ORDER WHICH COULD HAVE BEEN DELIVERED THROUGH AFFIRMATIVE OR NEGATIVE PROCEDURE

The Government's proposals to make scrutiny of Orders more proportionate stemmed from recognition that past Orders have varied considerably in terms of size, complexity and controversiality. More specifically, the proposals to allow small or uncontroversial measures to be delivered by a faster procedure build on the knowledge that several past orders were very straightforward. The Government considers that such orders, examples of which are given below, could have been delivered through a more proportionate route.

Regulatory Reform (Trading Stamps) Order 2005

The Trading Stamps Order repealed the 1964 Trading Stamps Act, which had regulated the exchange of trading stamps for goods in the retail sector. The Act had subsequently become obsolete, as such practices fell into disuse and were superseded by alternative electronic customer rewards schemes.

The Order also harmonized and modernised legislation relating to trading stamps by expanding the scope of the 1982 Supply of Goods and Services Act to include electronic schemes and removing references to trading stamps in other legislation.

The Order was notable as a simple and uncontroversial measure designed to ease burdens on the retail sector.

Regulatory Reform (National Health Service Charitable and Non-charitable Trust Accounts and Audit) Order 2005

This Order removed an anomaly in existing legislation that required NHS charitable trusts to produce two sets of accounts—for submission to the Charity Commission and the Department of Health/National Assembly for Wales. The Order reduced burdens on charitable trusts by stipulating that such bodies only need to submit accounts to the Charity Commission.

Regulatory Reform (Museum of London) (Location of Premises) Order 2004

This Order made a two line amendment to the Museum of London Act 1964, which had prevented the Museum of London from running a museum outside the limits of the City of London. The Order widened the boundary to "Greater London".

The Regulatory Reform (Sunday Trading) Order 2004

This Order contained two proposals for reducing burdens on Sunday trading. It amended the Sunday Trading Act 1994 to remove the requirement for large shops to inform local authorities of their opening hours two weeks in advance and the requirement on local authorities to maintain a register of notifications. The Order also removed the prohibition on the sale of methylated spirits between the hours of 10pm on Saturday and 8am the following Monday.

The Regulatory Reform (Sugar Beet Research and Education) Order 2003

The Sugar Beet Research and Education Order removed the burden on sugar beet growers and processors to provide for the cost of a government research and education programme, bringing the legislation into line with current research and development practice within the sugar beet industry.

Annex E

EXAMPLES OF TYPES OF MEASURE POTENTIALLY SUITABLE FOR SUPER-AFFIRMATIVE, AFFIRMATIVE OR NEGATIVE PROCEDURE

Super-affirmative

Examples of the kind of large or more complex proposals that the Government envisages might be subject to super-affirmative procedure include:

- complex mergers;
- some Law Commission recommendations or
- proposals involving whole regimes, across a number of Acts.

Negative or Affirmative

Examples of the kind of smaller, less complex and uncontroversial proposals that the Government envisages could be candidates for negative or affirmative scrutiny procedure include:

- proposals to lessen administrative burdens such as overly onerous form filling requirements,
- proposals which clarify legislation or improve the accessibility of legislation,
- allowing for certain administrative tasks to be carried out via electronic means, to facilitate the Government's e-government agenda.

A Bill for Better Regulation: Consultation Document also invited respondents to express their views on the sorts of measures they could envisage being delivered by a faster procedure. Respondents commented on factors they would expect to be taken into account when determining appropriate levels of parliamentary scrutiny:

- Respondents emphasised that smaller, less complex or uncontroversial measures would be appropriate for delivery by the faster route. For example, the Society Chief Officers of Trading Standards Scotland noted that "*it would be sensible to have provision for minor and uncontroversial proposals to be dealt with under the faster procedures for ordinary statutory instruments*".
- The Institute of Directors provided an example of a previous order that would have been suitable for delivery by a faster procedure: "*the recent RRO on Execution of Deeds and Documents provides a good example of the kind of relatively minor measure that could be handled by a simple affirmative resolution or even by a negative procedure*."

— The issue of controversiality, and the appropriate procedure for particularly uncontroversial measures, featured in a number of consultation responses. The Confederation of British Industry stated: "*We propose that the Parliamentary procedure used to scrutinize an RRO depends on the degree of consensus achieved by the Minister. The simplest, quickest, negative procedure, would be used when a high degree of consensus could be demonstrated and there were no objections*". The Small Businesses Council agreed, stating, "*it should be possible for less complex/controversial orders to use a faster procedure*."

— A number of organisations also stated that the size of orders should not prevent their delivery by a faster procedure. For example, the Environment Agency noted that "*if proposed reforms are beneficial and consensus-driven it would be unfortunate if they were delayed purely because of size considerations*."

February 2006

Witnesses: **Mr Jim Murphy,** a Member of the House, Parliamentary Secretary, Cabinet Office, **Kate Jennings,** Bill Team Manager, Better Regulation Executive, and **Sarah Hulcoop,** Treasury Solicitors, gave evidence.

Q1 Chairman: Can I, on behalf of the Committee, welcome you, Minister, and your colleagues and thank you for coming. We appreciate what a busy diary ministers have, so we are grateful to you for coming along. Can I just remind you that this session is being web-cast, so any *sotto voce* comments you may make after you have heard a question may not be as *sotto voce* as you would wish. We are obviously concerned about the effects of the Bill which you will be dealing with this Thursday, so we have got a number of questions to ask you. Could I start by asking you if you want to make a statement. The Committee has had a copy of your memorandum, but is there anything at the outset that you wish to add to that?
Mr Murphy: I do not think so, Chairman, apart from to introduce my two fellow witnesses this afternoon: Kate Jennings, who is the head of the Bill Team; and Sarah Hulcoop, who is from the legal team, offering legal advice in respect of the Bill. I have already given evidence to the Regulatory Reform Select Committee and I am delighted to have the opportunity to do so again here today.

Q2 Chairman: Could I just ask something about your attitude to the Bill as it wends its way through its parliamentary passage. Are you taking an open-minded and flexible attitude on this, rather as a minister might do if it was pre-legislative scrutiny, or do you take the view that the Bill encompasses your conclusions and you would be pretty much seeking to keep the Bill as it is?
Mr Murphy: I think we have arrived at the Bill through a period of, whilst I accept not pre-legislative scrutiny, consultation, particularly with business organisations through last summer. As you will know, Chairman, there is a consensus that the 2001 Act, whilst worthy in its sentiment and its ambition, because of the way it is structured, the review of the 2001 Act has suggested that we needed to have a different set of structures and a different way of implementing a more ambitious Better Regulation Agenda. However, and quite rightly, the Regulatory Reform Select Committee, to which, as I mentioned, I gave evidence in December, has produced, I think, an excellent report[1] with, I think, 17 recommendations, 12 of which relate directly to the content of the Bill and five, I think, relate to the terms of reference of the Regulatory Reform Select Committee. I am sure you would not expect me, Chairman, to have specific and detailed responses to the Select Committee's report which was published yesterday, but what I would say is that we think that many of those recommendations have a good deal of merit and we are minded to see just how we can take on board the specific suggestions made by the Regulatory Reform Select Committee on the basis that that Select Committee, as you know, Chairman, has done an excellent job in scrutinising many of the, 27 orders that went through the House and it would be right that we take into account their experiences and the sentiments and recommendations that they have come up with.

Q3 Chairman: Thank you for that. Is this not just the sort of legislation though that ought to perhaps be referred to a special standing committee?
Mr Murphy: That is a decision ultimately that business managers will take and, as you will be aware, that is not our role in the Cabinet Office. Our sense is that careful scrutiny both through the Commons and the Lords would not make that necessary, particularly on the basis of the number of stakeholders within Parliament who quite rightly are expressing an interest and we have been able to give evidence and exchange ideas, so, whilst it is not our role and it is an issue for business managers, it is not something that we are initially attracted to.

Q4 Annette Brooke: Minister, you did mention structures briefly just now, but I wonder if you could give us your own view why the Regulatory Reform Act actually did fail to meet its set objectives.
Mr Murphy: I am happy to give you my own personal views and then there are the views of all of those stakeholders, business, the public sector and the voluntary organisations, who have their own sense as to why it did not achieve what they

[1] Regulatory Reform Committee, First Special Report of Session 2005–06, *Legislative and Regulatory Reform Bill*, HC 878.

hoped it would achieve. We only have an hour or so, so I will try and be as quick as possible with this answer. My own view is that the 2001 Act was a reflection of the ambition at that time. It was a sense that the sort of super-affirmative procedure would deliver a substantial number of regulatory reform orders and the review of the Act has shown that that is not the case. Now, why has that been so? My own sense is that the 2001 Act too narrowly defined the burden, that it had to be a legal burden, and it could not, for example, lift the administrative burdens, of which we know there are very substantial amounts across public sector, business and the voluntary sector. I think one of the biggest criticisms that has come across is the rather narrow definition of a burden. The other wider issue though is I think that there is a culture, to be frank, across Parliament, government and the Civil Service which is that there is a lot of, quite rightly, energy and effort on introducing new regulations, and politicians of all parties get elected on the basis that, "If there's a problem, I'll try and help fix it". There are very few politicians, though there are some, but very few, who say, "Send me to Parliament and I will try and make sure that government and Parliament does less", so it is an issue of the culture of politics. It is also an issue of the culture of the Civil Service and I do not wish to make any criticism of the Civil Service at all, and I know Kate will not take this personally, but the head of a bill team is, quite rightly, a position of some responsibility and prestige. To be the person in charge of bringing through a regulatory reform order, or an order which we are talking about now, is not part of the culture and there is inequality of prestige there partly because, and only partly because, many departments do not have a sense that putting in the effort, the energy, the resources and the time will lead to their suggestions and their simplification proposals being implemented on the basis that they sometimes sit on the shelf. Now, I do not want to make a party-political point on this, but across governments throughout time sensible recommendations and simplifications have not been able to get space in a very crowded parliamentary cycle and what we are hoping to do, learning from that experience, is to have a wider definition of the burden and providing a structure which we think will ensure that departments have a genuine expectation that their sensible simplification proposals will find a route in influencing the legislative and administrative burden in the UK. That is my own sense, but of course stakeholders, voluntary, private and public, have offered their own assessments as to their feelings of the weaknesses in the 2001 Act. There have been important advances, but not enough.

Q5 Annette Brooke: Are there any specific reforms that the new legislation will enable you to bring in which will really make a difference?

Mr Murphy: I think the two biggest which I mentioned just now would be, firstly, that we are in a process of what is called, and I am sure we should have a better title for this, but it is called the "admin burdens project" which is seeking to analyse the overall figure in the UK economy of administrative burdens on business and then, having identified that figure, for the first time ever setting targets for its reduction. That is following on from the Dutch and the Danish approach to this where they have had some success. Now, our economy, in terms of its scale, is much greater and we are seeking to learn from their experience and perhaps go a little further. The second is that every government department has been encouraged/directed that by November they have got to come up with their own simplification plans of unnecessary bureaucracy, unnecessary admin burdens, outdated legislative arrangements. The Health & Safety Executive, Defra, I think, and the DTI are the first three that have come up with their proposals, those are already in the public domain, and every other government department will have to do likewise. So the implementation of the admin burdens project, removing a lot of the administrative burden on business, and then these department-by-department simplification plans are the two areas where we would expect a very significant driver of the orders under the new Bill and those have not been there in the past. It is just a different level of ambition in terms of the Better Regulation Agenda.

Q6 Ms Clark: The Government is presenting this Bill as a successor to the Regulatory Reform Act. How do you respond to the argument that, rather than a logical improvement to the previous regime, this Bill raises fundamental constitutional questions about how Parliament should consider primary legislation?

Mr Murphy: I read that press release as well from the Regulatory Reform Select Committee and, as I say, I have a genuinely excellent working relationship with the Regulatory Reform Select Committee. It is the case that we are seeking to go further and more effectively than the 2001 Act allows. It is not about redrawing any constitutional arrangement. In fact every protection in the 2001 Act will remain, every single protection will remain, and of course, as part of the Regulatory Reform Select Committee's recommendations, if there are sensible ways in which we can strengthen some of those protections, then we are minded to do so, so the protections remain. It is in some senses about allowing Parliament to decide what is the most appropriate scrutiny because, whilst a minister will say, and it is not just ministers in the Cabinet Office of course, but ministers across government, "We have had public consultation which is statutory and here are the conclusions of the consultation and, as a minister, my analysis is that this is not controversial, there is wide stakeholder support for this", the minister could recommend negative or affirmative procedure on the order, but the Select Committee itself can recommend a higher level of scrutiny, and that is an important protection. Ultimately it can kick the whole thing out and say, "We do not believe that this fits the right of Parliament and protections of Parliament to

legislate in a sensible way". Ultimately the Regulatory Reform Select Committee and, I think, the Delegated Powers Committee in the Lords have this right either to suggest, "The Minister is recommending too light a scrutiny", or indeed, if the committees are unhappy with the nature of the suggestion, they can effectively veto it and that will give, we sense, a real protection to Parliament in the way that it has at the moment, so those protections are there and will remain.

Q7 Chairman: But that is not actually in the Bill, is it?
Mr Murphy: It is not on the face of the Bill and it was not on the face of the Bill, as I understand it, for the 2001 Act. It was by ministerial statements during the debates in the Commons and, I suspect, in the Lords as well, Chairman. That is an undertaking that no one has suggested in the past four years, that there has been an attempt in any way to walk away, even an inch away, from it. It is one of the issues that the Regulatory Reform Select Committee have made a recommendation on and, Chairman, we are going to reflect on that as to whether there is a way to offer further reassurance. I anticipate you would accept that, in the 24 hours we have had since the Committee produced its report, we are not in a position to be specific about that, but we are looking at ways to offer further reassurance, but underlining that at no point in the past four years since the 2001 Act has there been a suggestion from the select committees that we have sought to move away in any way from that ministerial undertaking, but, if there are further things we can do to offer you reassurance, we are minded to work in a way to do that.

Q8 Ms Clark: The Bill does, however, provide that it cannot be used to legislate on certain subjects and it presented some of those areas, such as imposing taxes and creating new criminal offences with penalties of more than two years' imprisonment. Can you suggest other subjects for which you believe it would be inappropriate to use the provisions of this Bill?
Mr Murphy: That is a dangerous question. I can sense that your legal training is trying to trip me up there! The obvious answer is things like changing the asylum process, but we are not going there because the commitment we have given repeatedly, and I have given again to the Regulatory Reform Select Committee, is that we will give a guarantee that we will not do anything highly controversial. Now, that will be a learning process, as it was in 2001, as to what is perceived to be highly controversial. If you are asking me to speculate, there will be a general acceptance that substantial change on a contentious area of policy should not be brought through in this way. However, if, for example, under immigration policy there was a way in which we could merge 10 of the forms into one form, no one would say that would not be a sensible simplification. Therefore, whilst the attraction is to say that we should do nothing in this area because it would be highly controversial, to say that we will do nothing on an area of government responsibility or within a department perhaps would reduce our ability to introduce simplification on bureaucracy and admin burden, so our commitment is very clear, that we will not seek to do anything which is highly controversial. The Select Committee will make a judgment on that and the Select Committee can veto any recommendation from a minister. That is why I am not tempted to say what you maybe anticipate me saying which is that here are specific areas because, within those areas, there is an anticipation that we can cut the bureaucratic burden and simplify the administration of important areas of government responsibility. If there is a commonsense way of doing that and there is consensus on doing that, I think we should use this new arrangement to implement those sorts of simplifications and reductions in admin burdens.

Q9 Chairman: You have used the words "highly controversial", so does that mean that under this procedure, if it gets through, you are prepared to be controversial?
Mr Murphy: The Committee will ultimately decide what they believe to be suitable for this process and the commitment we have given is "highly controversial". I think, was it Lord Falconer or someone, and I only say this in a joking way of course, but Lord Falconer said, "How do you define this? It is a bit like defining an elephant in that you do not know how to define or describe it, but, when you see it, you know what it is". In terms of what is controversial or highly controversial, a minister will make a judgment, but only after there has been a statutory public consultation with all stakeholders, that is then analysed, and the committees of course even at that stage will know of any recommendations coming because they will be informed of the consultation on a proposed order. Then, ultimately, when the minister analyses all the responses as part of the consultation, there will be an initial assessment as to what is reasonable, what is controversial and what is highly controversial. The minister will lay a draft order and relevant select committees will say, "It doesn't feel right". They may say, "It feels as if it is going too far", or they may feel it contains one specific clause or one specific aspect which they are uncomfortable with and, ultimately, based on the Regulatory Reform Select Committee's recommendation, we are looking at ways in which, for example, if we can construct a way in which specific amendments can be taken on board, that may be our way ahead. Ultimately, the sanction that select committees have is, "It doesn't feel right. You have overstepped what we anticipated and we are not willing to give our consent to this going forward either in the way you propose", so it should not be a negative, it should be an affirmative order or it should be super-affirmative, "or it should not go ahead at all". That is the way we anticipate this working at the moment, Chairman.

Q10 Mr Gauke: We have moved away, I think, from the Better Regulation Task Force review of the old regulatory reform orders, when it talked about the need to extend what you had so that non-controversial orders could be simplified to now where we are talking about "highly controversial". Is there not an argument for the Bill only to apply to non-controversial matters and actually saying so explicitly within the terms of the Bill, which I do not believe it does?
Mr Murphy: Well, this is a difficulty, as your Chairman has already identified quite appropriately, as to how to define it. If you were on the face of the Bill to say, "non-controversial", I think the Bill would become a book in terms of defining what "controversial" and what "non-controversial" are. One of the strengths of the 2001 Act, which, as I say, had its weaknesses and I have shared with you my personal assessment of what those weaknesses were, but one of the strengths, was that it allowed a proper working arrangement between whichever government minister and department and the relevant select committees. Through a process of evolution of what is controversial, highly controversial and what is reasonable, it allowed accommodation of stakeholder consultation, ministerial assessment and select committee recommendation to decide where the centre of gravity is on controversial or highly controversial and it is our sense that that is still the correct way to progress so that in time a select committee, government and stakeholders will effectively establish where the line is. The lesson from the 2001 Act is that that was done really pretty effectively and the Regulatory Reform Select Committee certainly mentioned that they see that as one of the strengths, I think, in the current process.

Q11 Mr Gauke: Correct me if I am wrong, but I do not think there is anything within the Bill which says that the committees charged with the consideration of a draft order have a right to say, "This is too controversial".
Mr Murphy: I could not draw you to the verbatim quote. Someone will perhaps give me a copy of the Bill from which I can give you the verbatim quote, but it says that the committee is "charged by the House", which is the phrase I recall from the Bill. I think it is all—

Q12 Mr Gauke: And they can just throw it out on the basis of being too controversial?
Mr Murphy: Yes, absolutely, and there is a committee in the Commons and a committee in the Lords. As I say, there are three tiers of scrutiny within the committee, negative, affirmative and super-affirmative, so they can either move it up one, or move it up two in fact, so they can move it from negative to super-affirmative, or indeed they could just say, "We don't think this is suitable at all for this committee", and we are back to the drawing board to seek an alternative way of implementing the order.

Q13 Chairman: Before this session is over, could you point us to where in the Bill this undertaking is contained?
Mr Murphy: Of course.

Q14 Chairman: If it is not on the face of the Bill, are you giving us a firm pledge that the relevant committee would have an absolute veto in this area if it felt the subject matter was too sensitive and politically controversial?
Mr Murphy: I can give you that undertaking, absolutely.

Q15 Sir Robert Smith: Minister, have you actually found the part of the Bill?
Mr Murphy: That is what we are looking for just now, sorry, Sir Robert!

Q16 Sir Robert Smith: I thought you might have found it already. If it is somewhere in the Bill and you can find it, let us know. You said that the Regulatory Reform Select Committee report has a lot of merits in it. When do you think you will be publishing your response to it?
Mr Murphy: I think there is a timetable which is kind of dictated by parliamentary events. I do not think it would be appropriate to go into the standing committee deliberations of this Bill not having produced a response, and, rather than saying a week, three days, 10 days, I think in terms of the dynamic of Parliament, we have to have that produced in good time to allow the Standing Committee to reflect upon it.

Q17 Sir Robert Smith: If it looks like it is going to take you more time to give a considered response, would it be worth the procedures of the Bill being put on hold while you wait for that response?
Mr Murphy: I do not anticipate that, and I have already had numerous conversations arising from the Regulatory Reform Select Committee report and recommendations and we are developing our response pretty quickly. We will be in a position whereby we will produce our response in good time in advance of the Standing Committee beginning its work. However, if it is an issue where we have not got the sort of syntax correct or we are just adding detail, I think we will produce a general steer certainly as a minimum in advance of the Standing Committee's consideration of the Bill.

Q18 Sir Robert Smith: We have discussed the scope of this Bill and the orders that could come from it. Which of the bills announced in the Queen's Speech in May could not have been introduced in the form of an order under this Bill if it had been in force?
Mr Murphy: Without going into the details of the Queen's Speech, the type of thing that could not be implemented under the previous arrangement which perhaps could now would be the very substantial effort that is going to be made on the administrative burden process. In order to estimate the cost of admin burdens, project team has contacted over 200,000 businesses in the UK to try and identify what are the headline, most significant

and common admin burdens. Currently, within the 2001 Act, in the way it is defined, that work would not find a legislative vehicle or would not find a parliamentary process to implement an awful lot of it, and similarly again from the simplification proposals. Ultimately, the sort of what are defined as "flagship bills" in the Queen's Speech, it would not be my anticipation that the Government would seek to introduce any of those through this way and, ultimately, the Committee would decide.

Q19 Sir Robert Smith: But a future government could decide to do immigration, asylum and nationality, police and justice and agreement to the European Constitution under this process if it wanted to try?
Mr Murphy: I think it would be pretty foolish to try.

Q20 Sir Robert Smith: But it could?
Mr Murphy: Well, it could probably try that just now under the 2001 Act, or not probably, it could. My assessment is that, under the 2001 Act, it could do much of that now by going through the super-affirmative procedure. As I say, the commitment at the moment, under the right of veto, is a ministerial undertaking, so much of that could already happen.

Q21 Sir Robert Smith: But, under current legislation, it is restricted to removing a burden?
Mr Murphy: It is restricted from removing burdens in terms of admin burdens. It was a really narrow definition of "burdens".

Q22 Sir Robert Smith: So I think a lot of this legislation could not have come in under the current Regulatory Reform Act.
Ms Jennings: I think what the Minister is saying here is that what you had to do was identify the legal burden you were removing and then, under the current Act, you could add as many burdens as you wanted to as long as you demonstrated that they were proportionate and they met the conditions and safeguards. In theory, there will be nothing to prevent you from looking at one of those subject areas you have mentioned and saying, "Here is a legal restriction or requirement and we are proposing to remove this individual restriction or requirement and then, having done that, we will move around all of these other restrictions and requirements and do these other policy changes", and, as long as they meet the limitations and the safeguards in the 2001 Act, you could do that because there was not any sort of subject matter veto, as it were. The veto was, as the Minister says it was, a sort of undertaking where the committees would have the right to throw proposals out and would not force things through.

Q23 Mr Chope: Minister, what concerns me is that, in answering the question as to what this would not be used for during the review process, this is what you said: "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". Well, that is one very extreme end of the spectrum. With the idea that we should alter the Parliament Act, which is fundamental to our liberties, parliamentary democracy, not by order, there is not much consolation to know that we cannot alter the Terrorism Act by order, but that means everything else short of the Parliament Act and terrorism law you regard as fair game.
Mr Murphy: No, I do not think so. The reassurance in the statement I made is that it should not be highly controversial. We have also of course said that the size of an order should not in itself preclude it from going through this process. For example, I think it was the Regulatory Reform (Fire Safety) Order 2005 which was substantial in size and simplified legislation spread over 50 Acts which was done under the previous and less ambitious, in some way, 2001 Act. We have given our commitment that it would not be highly controversial and we have given a commitment that the relevant select committees will have the right of veto, as they currently have. We are looking at ways in which we can offer further reassurance on the way in which committees can operate their veto. As I say, it would be highly controversial because there is a public consultation at which, quite clearly, everyone would say, "Those examples you have mentioned are highly controversial", and the minister would make an assessment based on the feedback on the consultation and the minister would say, "It is clearly highly controversial". If, however, the minister said, which would be the wrong thing to do, "I disagree with the reaction, I disagree with the consultation, and I know best", then the minister would plough ahead, foolishly in my mind, but plough ahead nevertheless and make recommendations to the select committee and the select committee quite rightly would say, "You haven't listened to the consultation, you haven't listened to your own instincts, and you haven't listened to commonsense and we have no sense at all that this would be appropriate for the order-making power under this Bill", so those examples are at one extreme. Those are clearly never going to go through this type of order under whichever government, I think, is in power.

Q24 Chairman: So what you are saying in effect is that the committee would always veto it?
Mr Murphy: Absolutely, yes, and that is the ultimate sanction for Parliament.

Q25 Chairman: And if this is not on the face of the Bill, are you saying you would be prepared to put it on the face of the Bill, this power of veto?
Mr Murphy: I think, Chairman, as I have mentioned twice, I would not this afternoon offer specifics, but I think the general direction of travel is trying to find additional ways to offer that protection.

Q26 Mr Wilson: Minister, can I move on to procedural issues now and specifically introducing draft order and reference to the appropriate committee. When a draft order is introduced, there is a period of just 21 days for the House to decide whether to accept the Minister's recommendation on the parliamentary procedure to which it is subject. The Bill envisages that, in the first instance, this will be done by "a committee of [the] House charged with reporting on the draft order". Do you intend that all draft orders under this Bill will be considered by a committee specifically established for that purpose, in other words, a successor to the Regulatory Reform Committee?
Mr Murphy: This is actually, and I apologise for the confusion if it was myself that created it, but this is the phrase of course that I was grappling with and thank you incidentally for the reference to this phrase, but of course this phrase relates specifically to the procedures rather than the veto. In terms of which would be the appropriate committee, and this is on page 8, clause 13, the understanding at the moment is indeed, as you have suggested, that it would be the Regulatory Reform Select Committee and the Delegated Powers Committee in the Lords which would be the responsible ones at the moment. Yes, "a committee of that House charged with reporting", yes, that is anticipated to mean those two select committees.

Q27 Chairman: Or their successors?
Mr Murphy: Yes, or their successors, absolutely. Incidentally, and I do not know if we will have an opportunity to talk about this, but I think it is recommendations 12 to 17 of the Regulatory Reform Select Committee which are about widening the terms of reference of that Select Committee. Again I mentioned in evidence to the Select Committee that we are minded to agree to that and it is something that the Select Committee of course would then take up directly with the Leader of the House of Commons to establish just how much wider the terms of reference of the Regulatory Reform Select Committee should be, so that is an important point.

Q28 Mr Wilson: Will any successor committees have the same levels of expertise because they will not have had the opportunity to build those up as the Regulatory Reform Committee has?
Mr Murphy: I think that what would happen, as I understand the way in which this is drafted, is that the House will decide which is the most appropriate committee, so any successor committee will be designated by the House as being the appropriate select committee. I cannot imagine a circumstance whereby the House chooses to nominate, though it is ultimately up to the House of course, but whereby the Commons suggests an alternative committee which does not have the necessary resources and support to carry out this role. Ultimately, the Government's perspective on the Regulatory Reform Select Committee is that it is a strong ally on the Better Regulation Agenda and we want to make sure that it is effective and that its interventions are timely, so that is the sense in terms of the reassurance we are giving to that Select Committee and ultimately the House, as the Bill says, will decide which committee is the appropriate one to do that work.

Q29 Mr Chope: Minister, you say that the Government intends that there should be "a significant rise in the number of orders being brought forward" compared to the current numbers of regulatory reform orders. Does that mean that you think that one committee is still going to be able to cope with that enormously increased burden of responsibility and work?
Mr Murphy: There is some sense that that committee with its wider terms of reference will be able to do the job and, as I understand it, they are enthusiastically looking forward to doing the job. However, if, through time, our ambitions for more regular suggestions on new orders and simplifications are introduced, then, if the Committees says, "We don't have enough resource", or, "We don't have enough time", then we will work with them, and any recommendation from them within their terms of reference or support that we have will be made to the Leader of the House of Commons and we would make any adjustments that are necessary. It would not just be that one committee would do it and, as I say, they are enthusiastically looking forward to doing it.

Q30 Mr Chope: And, if that one committee cannot then cope, you would envisage more than one committee having this responsibility?
Mr Murphy: That is obviously a matter for the House, it is not an issue for the Government. The Government cannot say which committees should do it. The House of Commons will decide which select committee scrutinises government rather than the Government deciding which select committee will scrutinise government. I do not think you are suggesting that we should decide which select committee should scrutinise government.

Q31 Mr Chope: But they have to report on these detailed proposals within 21 days and some of them could extend to hundreds, if not thousands, of pages.
Mr Murphy: No, they do not have to report on it. Within 21 days they have got to decide whether the procedure is the appropriate one, whether it is negative, affirmative or super-affirmative. They have got to make an assessment as to whether the Government's recommendations are the right procedure. They have not got to conclude their assessment of it within those 21 days, but they just have to give an assessment as to whether this is the right feel and whether negative or affirmative procedure is the most effective way of doing it. They have not got to come to the end of the deliberations within 21 days.

Q32 Mr Chope: And the Regulatory Reform Committee itself does not think 21 days is adequate?
Mr Murphy: Yes.

Q33 Mr Chope: Are you minded to extend that period in line with their recommendation?
Mr Murphy: I know it sounds really boring to repeat what I said earlier, but that is one of the areas where we are going to listen to them, have a dialogue with them and, if there is a case, which there appears to be, to extend that 21 days, then we are minded to do that. Again, we will not have a specific evidence session this afternoon, but it is certainly something that we will put in the public domain in advance of the Standing Committee.

Q34 Mr Chope: The mood music you are putting forward is one of absolute reasonableness. Will that be reflected in allowing the Standing Committee that considers this Bill to do so in a responsible way without any restriction of timetabling and will that also be extended to the report stage and third reading because this is a highly controversial, constitutional change in many people's eyes and could even have probably been argued to be put on the floor of the House for the whole of its consideration? Can you, therefore, give an undertaking that the Committee, acting responsibly, will be able to proceed and look at this in detail with amendments as necessary in its own time without a government guillotine imposed?
Mr Murphy: I know you will expect this answer, but I am a Minister of the Cabinet Office rather than the Chief Whip and these issues are decided, as you know, through the sort of usual channels of course. The Government sees, we see, great merit in an exchange of ideas, an exchange of thoughts within the Standing Committee to see a way in which additional reassurance can be given to those genuinely felt, specific concerns that the Regulatory Reform Select Committee has advanced. As I know you would expect, I am not in a position to dictate as to how the Government orders its business; that is a matter for the usual channels and the Chief Whip of course, but in terms of the tone of it, however, you are absolutely correct.

Q35 Mr Chope: So what you are saying is that, if there is going to be a timetable, you will be arguing very strongly that this should be a very relaxed timetable? You are not a man without influence, Minister, and it may be that you are going to get that vacancy in the Cabinet which is much advertised. You surely take responsibility for this Bill and, if you say to the Chief Whip that the best way of getting this Bill in its best form on the statute book is by having a long and proper consideration of it in committee, that will hold sway, will it not?
Mr Murphy: Well, I was a government whip for three years and, if a minister said to me, "This is what I want to see happen", that is not always the best way to make something happen whereby the minister takes charge of the procedures of the House and the Government's timing of its agenda. However, I think you have anticipated from my tone today that we do want a genuine discussion, but the most effective way of doing that is not knocking on the Chief Whip's door and saying, "As a Cabinet Office Minister, I think you should X or Y". These are matters that are discussed through the usual channels. The opposition whips will make a bid, the government whips will make a response as to how guillotines, knives, sittings, timings, programme motions or anything of that nature are decided and it is really not for me to decide those matters, as you know.
Chairman: Did you want to ask something about the 21 days?

Q36 Mr Chope: Well, I touched on that and the Minister said he is not prepared to say whether or not he will accept the recommendation of 30 days from the Regulatory Reform Committee. They are talking about a minimum of 30 days, not just a norm of 30 days, reflecting that there may be issues of much greater complexity to consider. Also of course there is an issue about the parliamentary year and how this all fits in with the parliamentary year.
Mr Murphy: I know you are teasing me to come up with a specific answer and, as I said to the Chairman, we are reflecting on a really helpful report from the Regulatory Reform Select Committee and we will make our specific responses available in the public domain in advance of the Standing Committee deliberations. Without seeming to be a bad sport, I do not really have much more to add about how we are going to deal with that in our evidence session today.

Q37 Sir Robert Smith: Looking at one part of the procedure about how the committee can choose or demand a more demanding procedure, which can, however, be overturned by a resolution of the House, how do you see this procedure operating in practice?
Mr Murphy: As I mentioned earlier, it is not for the Government to dictate to the House how it polices itself and how it determines its own procedures. Ultimately, regardless of what the Government seeks to achieve, the House will come to a settled will. I do not know whether Kate is able to say whether, in any of the previous 27, I think it is, regulatory reform orders implemented under the 2001 Act, that scenario arose on any of those 27.
Ms Jennings: I think on those 27 orders it was the committees that made the decisions.

Q38 Chairman: I think the thinking here is that it would be quite possible for the Government to say that they have noted that the committee has vetoed this and then lay a motion bypassing the committee's veto, which, in the light of what you have said, I think would be seen as the Government acting in bad faith. I think what we are seeking is

an assurance from you that you do not see this becoming a practice under this Bill and that, if a committee vetoes it, a veto is a veto.

Mr Murphy: Chairman, what I will do is I will go and find out the history of all these 27 and some of the other regulatory reform orders that were also proposed but which were not successful and ascertain as to whether that was even muted at any point. What I would offer by way of further reassurance today is that we have previously given a ministerial undertaking to allow the relevant select committee to have a veto. If we are tempted, as we may be, to seek to offer further assurances on that, it would kind of be incongruous then to do what, quite rightly, Robert has raised.

Q39 Sir Robert Smith: It is interesting because, on the Bill, you are writing in a procedure whereby the committee does not have a veto because the House can overturn the committee.

Mr Murphy: Well, the fact is, as you know, that the will of the House supersedes the will of the committee. We can have that debate if we wish, but that is the way in which we have settled our arrangements and again it is not for the Government to say that that is the right procedure or the wrong procedure; it is the procedure we have. I have my own view which is that I think we have got it in about the right place, but it is a part of this that the Government will not, and should not, seek to redraw the established protocols and arrangements that, in the main, work.

Q40 Sir Robert Smith: It is interesting the way this 21-day rule works because, if the committee makes its recommendation on the 21st day, does that allow the House still to have a say?

Mr Murphy: Well, if the recommendation would be, for example, to take it up from affirmative to super-affirmative, that would then still give them another 39 days minimum to then take it because, under the super-affirmative, it is up to 60 days, so, if they made it on the 21st day and said, "We don't like either the negative or the affirmative suggestion and we think it should be super-affirmative", then, if my arithmetic is right which I think it is, they have got another 39 days.

Q41 Sir Robert Smith: Where the House could then say, "No, the committee is being too cautious and it should just be affirmative"?

Ms Hulcoop: There is only the 21-day period in which either the House or the committee, whichever, makes that final decision to require the higher procedure, but it has obviously then got the additional amount of time to continue scrutinising the order. As the Bill is currently drafted, there is that 21-day cut-off and it would be for the House to organise internally when it would require a committee to make its recommendations and to allow enough time for that.

Mr Murphy: What I understand your question to be is that, if a committee makes a recommendation from 21 up to 60 and the Government says, "We don't fancy that", the Government could, by another route, rely on the will of the House. That is not where we are, it is not where we have been and perhaps, in advance of the committee stage, we can work on a working form of words that would offer the reassurance that we gave previously on giving the commitment from the Government. Certainly this Government, though again I am not seeking to be party-political and I have not sought to be so at any point today, would give a commitment not to do the sort of things you quite rightly raise as a hypothetical scenario.

Q42 Sir Robert Smith: Another possibility is that such a motion on the floor should have some kind of extra safety hurdle similar to, say, a closure motion where you have to have so many people there voting as well or more than a simple majority.

Mr Murphy: I am looking for the specific determination of parliamentary procedure and all I can offer you is this Government's position which is that we see the role of the Regulatory Reform Select Committee to be absolutely crucial and we work in partnership with them. Their influence has grown and the importance of their work has grown. It would be an entirely retrograde step were we, as a government, to say, "We know you have the expertise and we know that you carry out the crucial work that you do and you do it in a bipartisan way", if you like, "However, we are going to seek a way to bypass you". That is not really where we are at all and we will find a form of words. It is a reasonable point based on a very hypothetical scenario and I will seek a way to offer that reassurance.

Ms Jennings: In terms of the actual wording on the face of the Bill, the logic there was very much based on our understanding particularly in the House of Lords where committees advise the House and, therefore, it was not for us to say that the committee had a right of veto, as it were, and it had to be the House that had the authority, which is I think what the Minister is saying.

Q43 Ms Clark: Normally a statutory instrument subject to negative procedure comes into force when it is laid before Parliament and it remains in force unless, within 40 days, either House resolves that it should be annulled. Now, it appears that, under this Bill, orders subject to negative procedure cannot come into force until the end of the 40-day period. Is that the case?

Ms Jennings: It is the case and the logic there is simply that it may be that the committee has decided that the order moves up from being negative even to super-affirmative and, if that was the case, we would be assuming that that was because the committee wanted to make some sort of amendment to it. Therefore, the expectation was that it would be presumptuous to lay an order in the way that you would for a negative instrument.

Q44 Ms Clark: So, if it were a case of urgency, proceeding by affirmative procedure need be no slower. Is that not another argument against using negative procedure at all for these orders?

Mr Murphy: Well, again there would have to be public consultation and the Government would make an assessment or the minister would make an assessment and make a recommendation to the committee. The anticipation is that, on negative, it would be things like lifting an administrative burden where all the stakeholders have said that it is a commonsense tidy-up and whereby, across party, across the private sector, across the public sector, the voluntary sector, whatever, there is unanimity and there is no controversy whatsoever. That is what we would anticipate a negative procedure to be. What we are aiming to achieve through this Bill is a proportionate sense of regulation, and it is for the House to make the decision obviously, but the ministers would recommend what we think is the most proportionate parliamentary scrutiny based on the statutory public consultation and the ministerial assessment and recommendation to the committee. The Regulatory Reform Select Committee, I think, made a point in its report, or it certainly has been of the view in the past, that the current one-size-fits-all procedure is not a very effective way to do things, so in terms of the negative, it would be administrative tidy-ups and lifting of administrative burdens based on a consensus and that is the rationale for it.

Q45 Mr Gauke: Just looking at the affirmative procedure and how that works in practice, I have a couple of questions. The first stage is to draw up the draft order and to consult upon it and how long would you expect that process to take, the drawing-up and consulting on the draft order before you lay it before Parliament? Secondly, once that is done, and I understand it is there for a minimum of 40 days before being approved by resolutions in each House, what sort of scrutiny at a practical level is likely to happen during this 40-day period?
Mr Murphy: In terms of constructing an order, there is no exact science as to how long that takes; it depends on the nature of it, it depends which departments are involved, it depends on the size, the technicality and all sorts of other issues. There is no sort of set timescale for drafting and constructing an order. There is a set time-frame for the statutory public consultation of course which is 12 weeks, whereby there is an expectation, well, it is more than an expectation, that the statutory consultation should conform to the 12-week minimum. At that point, the anticipation would be that the relevant select committees, using both their informal radar and antennae, but also through a form of exchange of information which will be necessary to make effective scrutiny successful, would start that process and the relevant select committees would receive the information that we are minded to do this, that we are now going out to statutory public consultation and they themselves would start to begin their deliberations. At the end of that 12 weeks and after the Government has analysed all the responses and after the government minister has made an assessment, again how long is that period? Again there is not any exact science there. The select committees can continue to seek information along with their widened terms of reference which is important because at the moment there would be a sense that they would discuss amongst themselves, they would seek reports, they would get the clerk to carry out an analysis and analyse that analysis. If, for example, and I am not sure if it is one of the recommendations, they would have the power to carry out their own investigations within the Better Regulation Agenda, personally I think the scrutiny would be enhanced if we found a way which enabled them to do that. Therefore, in terms of the time-frame of the construction of the order, there is nothing specific as to how long it should take, but it is a substantial period of time, the public consultation on it is 12 weeks, and then the time the Government takes to assess the public consultation and then construct the final draft order for consideration, so you have got those different stages. By the second stage, ie the public consultation, the expectation is that the select committees would start to be engaged in it, particularly if they had a broadened remit in terms of reference.

Q46 Mr Gauke: In the memorandum, you refer to the fact that, "the relevant committees would carry out a function similar to that of other parliamentary committees which report on statutory instruments", and there is a suggestion there that perhaps the scrutiny will not be in respect of the merits of a draft order, but more procedural matters. Is that a concern that you recognise?
Mr Murphy: If that concern exists, and I am not aware that that concern does exist, I think you would have to approach the Regulatory Reform Select Committee to see if they have that concern, but it is certainly not the way we anticipate it working. The Regulatory Reform Select Committee, as it has done, will make its own assessment on the procedure and the content and it has to be able to do both, it is essential. It is of less value if it only makes an assessment of the procedure or the content; it needs to be able to do both.

Q47 Mr Gauke: Having outlined the timetable for it, the difference in timing before the affirmative procedure and the super-affirmative procedure at the most can be three or four weeks and again a consultation period of 40 days and so on, but it is fairly small. Can you imagine many orders that will be so urgent that you would want to go down the affirmative procedure rather than the super-affirmative procedure, given there is not much difference between the two?
Mr Murphy: I am not sure that urgency would be the reason as to why we went affirmative or negative rather than super-affirmative, but the sort of threshold of controversy would be responses to the statutory public consultation, so I do not think that would be the driving rationale for why we went for a shorter period rather than the more prolonged period. There may be examples in the future—

though I know we should never speculate, but I am just about to speculate, so I hope I do not get myself in trouble—whereby there is a pressing need for a simplification or a lifting of an administrative burden, for example, where the voluntary sector had said, "This was done for a good reason. However, there is an unintended consequence which Parliament perhaps was not aware of and, if it is not resolved this time three months from now, the problem will become a very real one". In those circumstances, perhaps we would work with the Regulatory Reform Select Committee to see if there was a common way through it, but certainly the timing and urgency is not the driver as to whether it is negative, affirmative or super-affirmative, but it is the policy content level of controversy which would drive that.
Chairman: Thank you.

Q48 Annette Brooke: Still on the super-affirmative procedure in the Bill, I understand the wording of the provisions in the new Bill is actually slightly different from that of its predecessor, the 2001 Act. What is actually the practical effect of the differences?
Ms Jennings: Could you say what specifically you are referring to?

Q49 Annette Brooke: For example, I understand the 2001 Bill requires the Minister to have regard in particular to any resolution or report of, or of any committee of either House of Parliament.
Ms Hulcoop: That is in because the 2001 Act had the super-affirmative procedure which is replicated in our Bill as one of the options, but the affirmative procedure, which is one of our options as well, does not have the same period during which the resolutions or recommendations can be made—Well, it does, but the super-affirmative procedure works by having that period and then for the Minister having to have regard to those and then for there to be the super-affirmative resolutions before the order can actually be made. That is not a standard affirmative resolution procedure.

Q50 Chairman: I think the point being made is that the wording is slightly different.
Mr Murphy: I wonder if you are in a position to give the specific wording you are referring to, Chairman?

Q51 Chairman: The previous wording, I understand, says, "In preparing a draft of an order . . . with or without variations, to proposals in a document laid before Parliament under section 6(1), the Minister concerned shall have regard to any representations made during the period for Parliamentary consideration and, in particular, to any resolution or report of, or of any committee of, either House of Parliament with regard to the document." The wording here is not the same. What we are asking is, is there any practical effect of these differences or is it just a difference in drafting?
Ms Jennings: I think it is just a difference in drafting. I am happy to take that away and check.
Mr Murphy: We will look into that.

Q52 Chairman: I will write to you with the wording we have picked up and would welcome your response.
Ms Jennings: We are certainly happy to check that.

Q53 Sir Robert Smith: The scope of the legislation which could be affected, as you say, could be quite major legislation under this procedure, and under the current super-affirmative procedure it is possible that if the committee approves it then there is no debate outside the committee on the actual order that is going through, because of the way the procedure works. Given that you are widening the scope of the likely things to be affected, do you think there could be some kind of procedure whereby the committee does not have to artificially divide to allow a debate on the floor of the House or allow a wider debate in Parliament?
Mr Murphy: Notwithstanding what I said earlier about seeking to provide additional reassurances, I think the House will charge the relevant committees to carry out this function for them, and it will ultimately be up to the committee to decide how to deal with it. The select committees are made up, as we know, of all sorts of different members, all sorts of different perspectives, and if an individual or individuals sought to make sure something was debated on the floor of the House, they may wish to use that trigger.

Q54 Sir Robert Smith: We just wondered whether there could not be another procedure whereby the committee could put it for debate on the floor of the House without having to artificially divide internally.
Mr Murphy: It is one of the things the RRC have recommended. Again I am in danger of repeating myself or responding in advance of the standing committee. I hope you do not see that as a discourtesy to your Committee, it is simply within 24 hours we are not in a position to offer specifics, and obviously our response will be primarily to the committee which made the recommendations.

Q55 Sir Robert Smith: Did you say earlier you were minded to look also at the possibility of some procedure for accepting amendments from here?
Mr Murphy: Yes, if the Committee suggests a small tidying-up or a tweak, we will try and find a way in which that can be enabled.

Q56 Mr Wilson: Minister, private legislation can be amended by orders under the Bill. On page 12, paragraph 50 of your memorandum, you state that you would expect that the statutory consultation before the introduction of the draft order would include consultations with "the original petitioners where they continue to be affected by the

legislation" and the relevant committees "will be able to call witnesses to give representations where this is necessary." Does this mean that all such orders will proceed as super-affirmatives?
Mr Murphy: My initial response to that, and I will reflect on the specific point, would be that if it was an area of contention, where there was not a consensus, then we would seek to do it by super-affirmative procedure. However, if after consultation and listening to those who are affected it seems reasonable we can progress, I would anticipate the Minister would suggest perhaps an affirmative procedure. Ultimately the relevant committee charged by the House could then escalate the level of scrutiny of course.

Q57 Mr Wilson: Could you give any examples of amendments to private or hybrid legislation which you might want to make using orders under this Bill?
Mr Murphy: I will provide you with details on that.

Q58 Chairman: Do you see any restrictions on the trigger on when you would seek to amend private legislation? How would you define "highly controversial" in this context? For example, if we had a rogue local authority that was using a piece of private legislation in a way which most of us would regard as heavy-handed and acceptable only to regulation-ridden, form-filling, pen-pushing bureaucrats, would you see this as a way where national government would step in and water-down the private legislation because of the heavy-handed way it was being interpreted, even if locally it might be popular?
Mr Murphy: That would be a dangerous scenario to speculate on in front of your Committee today. However, in terms of where the threshold is, we would take soundings from the Regulatory Reform Select Committee as to where this threshold is. Again, Chairman, it would be a part of the sort of natural evolution of this new process to decide where the centre of gravity has been agreed as to what is the common sense procedure to adopt in that type of scenario. So I do not want to speculate, I am not in a position to speculate, on the specifics but it would be a process of evolution over quite a short period of time, I would suggest, as to what is considered appropriate for this type of order.

Q59 Chairman: You and your team have obviously decided to put all of the parliamentary procedures on the face of the Bill. Another way of doing it of course would be to have left Parliament itself with Government guidance to look at what procedural changes would be necessary. In any event, these changes are going to necessitate changes to our Standing Orders. Are you prepared to undertake to involve the Procedure Committee in any further discussions and debates that will necessarily be taking place in this regard?
Mr Murphy: My response to that would be the Cabinet Office in its role is not responsible for the Standing Orders of the House, but it is anticipated there is an impact on Standing Orders, and in a similar way there would be an expectation the Leader of the House would be in consultation with the Regulatory Reform Select Committee on their terms of reference. I think it is equally appropriate that the Leader of the House—indeed I anticipate this—would enter into a similar dialogue with your own Select Committee and others which are deemed appropriate under Standing Orders.

Q60 Chairman: I presume at this stage you cannot give any timescale as to when you would see any proposals to change Standing Orders taking place?
Mr Murphy: Today I do not have a specific timetable but I will respond to any request from you, Chairman, for that timetable.

Q61 Mr Chope: Could I come back to the point I was making, Minister, about the nature of the committee which is considering this? Under the definitions contained within this Bill, the Minister is precluding the possibility of the House authorities deciding we might have a different committee considering the merits of a regulatory order compared with the procedure that order should go through, whereas before that was left open. Under the Bill as presently drafted the same committee would have to consider the procedure as considered the merits. Would the Minister consider amending the Bill to allow the flexibility which he indicated to me in response to an earlier question he desired?
Mr Murphy: I will reflect on that suggestion, but my sense is that it is important that the committee which is analysing the content of the order should also analyse whether that content has been dealt with in a procedurally appropriate manner in terms of parliamentary scrutiny. I will reflect on that.

Q62 Mr Chope: Surely that should be a matter for the House to decide?
Mr Murphy: The House of course will make a decision through its standing committee on the Bill and through report stage; and through second reading.

Q63 Mr Chope: Which committee it should go to should be a matter for the House to decide.
Mr Murphy: Of course, and the House can decide that at the report stage of the Bill. That is our sense, that the committee which looks at the content will also look at the procedure. Our sense is that to have two committees looking at different aspects of it is not the most effective way of doing it.

Q64 Mr Chope: Throughout the Minister has relied upon the burden procedure and said that what the Government is trying to do is to reduce burdens. Can I ask the Minister why, in the original consultation paper, the Government said it would retain the requirement that all Regulatory Reform Orders must remove or reduce a burden—that was the basis on which you went out to consultation—but subsequent to consultation you have removed the concept of burdens entirely from the legislation?

Mr Murphy: As I understand it, that is an assessment based on the previous position of a legal burden, because under the 2001 Act it was a legal burden rather than an administrative burden. We can all define our own sense of what constitutes a burden but under the 2001 Act it was designated as removing a legal burden and we think we should go further than that. Just picking up from that more widely, I had anticipated at some point being asked about removing protections and I want to reassure the Committee, even though you have not asked and time has not been available today to ask, that it is not the intention of this Bill or the new procedures envisaged within the Bill to remove—and we have given commitments on this—important protections on the environment, to employees, to customers and others. I wish to state verbally that reassurance which we have already given.

Q65 Sir Robert Smith: Are you not planning to put that in the Bill in any way?
Ms Jennings: It is on the face of the Bill in the sense of the necessary protections. If it was the case that a proposal cast any doubt on whether necessary protections were being maintained, we would expect that position to be used.

Q66 Chairman: Can I thank you, Minister, and your team for coming along to see us today. What is clear from these exchanges is that the dialogue will continue and I will be writing to you on the points I indicated earlier and we look forward to your response in due course when your thoughts have crystallised on some of the other areas we have covered. You did say at the outset you were not aware of any politician who got elected by promising to do less.
Mr Murphy: I am the exception, Chairman!

Q67 Chairman: I think one notable exception was President Ronald Reagan.
Mr Murphy: And then he did a lot more.

Q68 Chairman: Who knows, if you are successful in the way you have indicated, at some time in the future people may refer to you and Ronald Reagan in the same breath.
Mr Murphy: I will take that as a compliment!

Q69 Chairman: It was meant as one!
Mr Murphy: Thank you.
Chairman: Thank you for your attendance.

Supplementary evidence from Mr Jim Murphy MP, Parliamentary Secretary, Cabinet Office (P 53)

The Committee requested that examples be provided of amendments to private or hybrid legislation which might be made using order-making powers under the Bill (Question 57). Clause 1(3)(a) of the Bill would permit the amendment by order of local Acts (which concern particular areas and govern, for example, port and harbour authorities, charities or educational institutions). The Bill would not permit the amendment of personal Acts (which concerns named individuals and regulate such matters as family trusts or estates). An example of an amendment that would include making amendments to local and public Acts that might be suitable for delivery by order is the winding up of the Covent Garden Market Authority and return of the Market to the private sector. An order which made these amendments would contain provision which, if contained in a public Bill, would make that Bill hybrid.

At various points during the evidence session I referred to the effective veto which the relevant Parliamentary committees can exercise regarding individual draft orders. I would like to take this opportunity to clarify that this was a reference to the veto which is in effect created by the Ministerial undertaking given during the Parliamentary passage of the 2001 Act, which has to date never been departed from and will continue to apply to draft orders under the powers in this Bill, as it is currently drafted.

In response to Question 6, 1 stated that every protection in the 2001 Act will remain. In this respect I was referring to the limits on the power contained in the 2001 Act now contained in the pre-conditions of clause 3 of the Bill, which have been adapted to cater for the removal of the concept of legal burdens. These pre-conditions will now apply more generally to orders than under the 2001 Act, along with the added protection that no new taxation or taxation increases can be imposed using the order making power.

With reference to my response to Question 40, it should be noted that if a relevant committee were to make a recommendation on which procedure should apply to an order on day 21 of the procedure, and the relevant House were to make a contradictory resolution within the 21-day period, then the decision of the House would prevail over the recommendation of its committee. However the committee and the House are subject to the same, concurrent 21-day period.

Finally, I was asked in Questions 48 to 52 to explain whether there was any significance attached to the difference between the wording of the super-affirmative resolution procedure in the 2001 Act and the wording of the super-affirmative procedure in the Bill as it is currently drafted. The order-making procedure under the 2001 Act differs from that in the Bill in one aspect. Under the 2001 Act, a draft order is not laid until after the 60–day period for scrutiny has expired. Under the Bill, a draft order is laid at the beginning of the scrutiny period in order to enable either of the three alternative procedures to apply to an order. The drafting of clause 16 reflects this difference in particular. The Minister can lay a revised draft order at the end of the 60-day period if he considers that changes should be made to the original draft. Any further differences are drafting changes designed to ensure that the clause is as clear as possible. These do not have any substantive effect on how super-affirmative procedure works.

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