

# The Legislative and Regulatory Reform Bill

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## Summary

This Bill would enable Ministers to pass laws with virtually no parliamentary scrutiny. It gives enormous unchecked power to the executive and fundamentally changes the way we make laws. Under this Bill almost any law could be changed: the powers of the House of Lords could be changed; local government could be reorganized or even abolished. All this could potentially take place without a debate in Parliament.

The Bill is part of the Government's better regulation agenda and aims to reduce the regulatory burden on businesses and public services. The Government argues that the current process for removing legislative burdens is ineffective and that unless the process is changed many of the proposals the departments have for cutting red tape will not be able to be implemented. This Bill, it is argued, will make it quicker and easier to tackle unnecessary or over-complicated regulation and help bring about a risk-based approach to regulation.

This may well be how the Government intends to use the powers. The Government has repeatedly given assurances that they would not use this Bill to pass highly controversial measures. But the fact remains that there is nothing in this Bill to stop them.

Don't be fooled by the dull title; this Bill proposes a radical shift the balance of power from the legislature and the executive. The Regulatory Reform Committee considered that the Bill "has the potential to be the most constitutionally significant Bill that has been brought before Parliament for some years" and the Constitution Committee has expressed its concern at the "unprecedentedly wide powers" the Bill seeks to confer on Ministers.

This briefing only explores Part 1 of the Bill which deals with order making powers. For an analysis of Parts 2 and 3 of the Bill please see House of Commons Research Paper 06/06.

[http://www.parliament.uk/parliamentary\\_publications\\_and\\_archives/research\\_papers/research\\_papers\\_2006.cfm](http://www.parliament.uk/parliamentary_publications_and_archives/research_papers/research_papers_2006.cfm)

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## What are Regulatory Reform orders?

Regulatory Reform Orders (RROs) are a powerful tool which enable the reform of primary legislation. They can iron out inconsistencies or unintended consequences of legislation without the need for a new Bill and the parliamentary time needed to pass new laws. They are intended to reduce the regulatory or red tape burden on businesses and simplify regulations where more than one act of parliament applies.

The RRO procedure provides an alternative to the Bill procedure for amending or repealing primary legislation while providing a mechanism for detailed scrutiny both inside and outside Parliament. Because of the statutory requirement to put proposals for RROs out to public consultation, bodies that are most likely to be affected by legislative changes are directly consulted. Since 2001, twenty-seven orders have been approved covering a variety of subjects, including for example particular aspects of consumer protection law relating to trading stamps and fire safety.<sup>1</sup>

## What does the Legislative and Regulatory Reform Bill do?

It makes it substantially easier for Ministers to amend existing laws with only limited parliamentary scrutiny. The Bill enables Ministers to use statutory instruments to amend, repeal or replace any legislation (Clause 2 (1)).

Currently when a Minister wants to use an RRO to change the law they have to demonstrate that it is to remove burdens as defined by the 2001 Regulatory Reform Act. The Government argues that this is too restrictive a definition and therefore this has been removed from the current proposals. In addition an RRO cannot be used on common law or to amend an Act which has been passed in the last two years. Both these restrictions have been removed.

## Safeguards

The Government has included safeguards in the Bill but these are weaker than the 2001 Act. These are set out in Clause 3 (2):

- (a) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means;
- (b) the effect of the provision is proportionate to the policy objective;
- (c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;
- (d) the provision does not remove any necessary protection; and
- (e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

However, the Minister proposing the measure is the only person who has to be satisfied that the conditions have been met and then set out his or her reasoning in the explanatory document that is laid before Parliament with the order. There is no additional scrutiny to ensure that these safeguards have been met.

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## What could this Bill be used for?

In theory it could be used for almost anything. The only exceptions are that orders may not:

- (1) impose or increase taxation;
- (2) create offences or increase the penalty for offences that are punishable by imprisonment for not more than two years, on indictment; or for fifty-one weeks, on summary conviction; or levy a fine exceeding level five on the standard scale; or
- (3) authorize forcible entry, search or seizure; or compel the giving of evidence.

A group of senior law professors from Cambridge University believe that the Bill would make it possible for the Government to:

- create a new offence of incitement to religious hatred, punishable with two years' imprisonment;
- curtail or abolish jury trial;
- permit the Home Secretary to place citizens under house arrest;
- allow the Prime Minister to sack judges;
- rewrite the law on nationality and immigration; and
- "reform" Magna Carta (or what remains of it).<sup>2</sup>

In the second reading debate, Rob Marris MP cited the example of increasing the penalty for driving while using a hand held mobile phone.

"it appears that a Minister could decide to increase the penalty for using a hand-held mobile phone while driving, for example, to eighteen months' imprisonment. Such an increase would appear to be consistent with all five protections, and it meets the test under clause 6 because the period in question is less than two years. Many Members would regard increasing the current penalty for using a hand-held mobile phone while driving from three points on one's driving licence to eighteen months' imprisonment as rather more than a regulatory reform."<sup>3</sup>

There is no doubt that such a change would be a significant shift in policy and yet under these proposals there would be, at best, limited parliamentary scrutiny.

The Government insists that this Bill is simply about reducing the regulatory burden on businesses. It has also stated that these powers would not be used to pass "highly controversial" measures and that there would still be full parliamentary debate for measures to combat terrorism. However, even if we ignore the issue of who defines what is and is not controversial, no future Government would be bound by this assurance unless additional safeguards are added to the Bill.

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## Parliamentary Scrutiny

In addition to increasing the ability of Ministers to use orders, the Bill also dramatically reduces the level of scrutiny of these measures. Currently all Regulatory Reform Orders are implemented under the super-affirmative procedure outlined below.

Under the new proposals, the Minister proposing the order recommends the procedure under which Parliament should consider the order. It allows the Minister to choose between:

- (a) the negative resolution procedure;
- (b) the affirmative resolution procedure; or
- (c) the super-affirmative resolution procedure.

The reason for the choice must be explained in the explanatory document. If the Minister recommends either the negative or affirmative resolution procedure, both Houses are given twenty-one days to consider the recommendation. If either House requires that a more stringent form of consideration is necessary then it is applied (Clause 13 (3) and (4)).

### The Negative Resolution Procedure

The Order becomes law on the date stated on it but will be annulled if either House passes a motion calling for its annulment within a certain time. This time period is usually forty days including the day on which it was laid. This does not include any time during which Parliament is dissolved or prorogued, or during which both Houses are adjourned for more than four days. A motion calling for annulment is known as a prayer, couched in such terms as:

"That an humble address be presented to Her Majesty praying that the Asylum Seekers (Interim Provisions) Regulations 1999 ... be annulled".

In the House of Commons any Member may put down a motion to annul an Order subject to the Negative Procedure. In practice, such motions are now generally put down as Early Day Motions (EDMs), which are motions for which no time has been fixed and, in the vast majority of cases, for which no time is likely to be available. A motion put down by the Official Opposition will often be accommodated although there is no absolute certainty of this. An annulment motion put down by a backbencher is unlikely to be dealt with but a debate may be arranged if there are a large number of signatories to the EDM.

In the House of Lords prayers can be tabled by an individual Member and are usually debated, although rarely put to the vote.

A relatively recent example of a successful motion to annul occurred on 22 February 2000, when the House of Lords rejected the Greater London Authority Elections Rules (SI 2000/208).

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The House of Commons last annulled a Statutory Instrument on 24th October 1979 (the Paraffin (Maximum Retail Prices) (Revocation) Order 1979 (S.I. 1979, No. 797)).<sup>4</sup>

### **Affirmative Procedure**

This is less common than the negative procedure, currently representing about ten percent of instruments subject to parliamentary procedure, but provides more stringent parliamentary control since the instrument must receive Parliament's approval before it can come into force or to remain in force.

Such Orders cannot be made unless the draft Order is approved by Parliament. To do this, a motion approving it has to be passed by both Houses (or by the Commons alone if deals with financial matters). The responsibility lies with the Minister, having laid the Instrument, to move the motion for approval.

The last time a draft Statutory Instrument subject to affirmative procedure was not approved by Resolution of the House of Commons was on 12th November 1969 when House agreed to motions that the Draft Parliamentary Constituencies (England) Order 1969, the Draft Parliamentary Constituencies (Wales) Order 1969, the Parliamentary Constituencies (Scotland) Order 1969 and the Parliamentary Constituencies (Northern Ireland) Order 'be not approved'.<sup>5</sup>

### **Super Affirmation Resolution**

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

A recent example of a draft RRO subject to the super-affirmation procedure not being approved was in December 2004. Both parliamentary committees rejected Regulatory Reform (Registration of Births and Deaths) (England and Wales) Order 2004 on the grounds that it was inappropriate for delegated legislation.<sup>6</sup>

Only under the super-affirmation procedure can Parliament, through the select committees, amend the Order. Under the negative resolution or affirmative processes the Order cannot be amended or adapted by either House. Each House simply expresses its wish for the Order either to be annulled or to pass into law, as the case may be.

There is a grave danger that the negative resolution procedure would become the default option for implementing these wide ranging powers.

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## Recommendations

There is no doubt that the 2001 Act has not been as efficient as the Government had intended in reducing red tape. However, sacrificing parliamentary scrutiny of executive power is not the way to make these procedures more efficient. Although the Government conducted a review of the 2001 Regulatory Reform Act it failed to identify the causes of the delays in introducing RRO's.

The Select Committee on Regulatory Reform found that departments were slow in bringing proposals to Parliament and in making the Orders once Parliament had responded and made recommendations. For example, the Committee reported no changes on the Regulatory Reform (Execution of Deeds and Documents ) Order 2004, but it still took three and a half months before the Order was made. The consultation-to-order-made process on the Regulatory Reform (Sugar Beet Research and Education) Order 2003 lasted 1,924 days, of which only 113 days were for parliamentary scrutiny.<sup>7</sup>

The Select Committee on Regulatory Reform has proposed a number of amendments to the Bill to simplify the process for removing regulations whilst maintaining parliamentary scrutiny. These include enabling either House to veto the proposed order. Under this proposal it would be possible for either House of Parliament, or for the relevant committee of either House, not only to vary the Minister's recommended procedure on a given draft Order, but also to determine that the procedure should not apply to it at all. If it is decided that these procedures should not be used, no further draft Order to the same effect could be laid before Parliament within two years.

The Committee also recommends that the Bill should be amended to reinforce parliamentary procedures to reduce the risk of effective scrutiny being by-passed. They propose three options with increasing levels of oversight, none of which fundamentally alters the Bill or extends the scrutiny period beyond what the Cabinet Office states that it needs itself. The New Politics Network supports the third recommendation for the highest level of scrutiny and suggest that the Bill should be amended to:

- delete the negative option;
- introduce a default rule of super-affirmative procedure; and
- to merge all time limits into a sixty day limit (both for scrutiny and for either House not to follow the default procedure), and also to provide that the parliamentary time limits for consideration of a Part 1 Order should be adjustable upwards, with a maximum adjustment of thirty days, on a resolution of either House, or a recommendation of the responsible committee of either House.

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## References

- 1 House of Commons Regulatory Reform Committee Legislative and Regulatory Reform Bill HC 878, January 2006, p9.
- 2 Letter to the Times *Legislative Reform*, 16 February 2006  
<http://www.timesonline.co.uk/article/0,,59-2042165,00.html>
- 3 <http://www.theyworkforyou.com/debates/?id=2006-0209a.1048.0&s=legislative+and+regulatory+reform+bill#g1085.1>
- 4 House of Commons Information Office Factsheet Statutory Instruments F7 June 2005
- 5 House of Commons Information Office Factsheet Statutory Instruments F7 June 2005
- 6 House of Commons Regulatory Reform Committee, Legislative and Regulatory Reform Bill HC 878, January 2006, p.10.
- 7 House of Commons Regulatory Reform Committee, Legislative and Regulatory Reform Bill HC 878, January 2006