**RESEARCH PAPER 01/27**
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# The *Regulatory Reform Bill [HL]*: order-making power and parliamentary aspects (Revised edition)

**Bill 51 of 2000-2001**

The *Regulatory Reform Bill [HL]* was introduced in the House of Lords in December 2000 and was passed by that House on 19 February 2001. It is due to be debated on second reading in the Commons on 19 March 2001.

The Bill provides for a new order–making power, widening the scope and application of deregulation orders that can be made under the *Deregulation and Contracting Out Act 1994.* The new orders would be called regulatory reform orders (RROs).

This paper covers clauses 1 to 8 of the Bill relating to the order-making power and the parliamentary scrutiny procedure. The other main provision of the Bill (contained in clauses 9 to 11) deals with enforcement matters. An accompanying research paper – No 01/26 - examines the enforcement provisions and the background to the issue of red tape.

The Bill applies to the whole of the UK and takes account of the devolution settlements, so that different provisions can be made by order for the different parts of the UK.

Aileen Walker

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## Summary of main points

A deregulation order-making power was created by sections 1 to 4 of the *Deregulation and Contracting Out Act 1994.* The order-making power can be used to remove or reduce a burden, mainly on business, provided no necessary protection is removed. Unusually, it enables primary legislation to be amended by secondary legislation, which raises questions of parliamentary and constitutional significance.

The purpose of the *Regulatory Reform Bill [HL]* is to extend the scope of the deregulation order-making power, without removing any of the safeguards. The aim is to make the power more flexible and consequently, more useful. The Bill was subject to an extensive consultation process and was published in draft for further pre-legislative scrutiny. Both parliamentary deregulation committees have commented fully on the Government's proposals for regulatory reform.

Orders under the extended power, expected to be called regulatory reform orders (RROs), would be capable not only of removing burdens, but of increasing or transferring burdens, under certain circumstances and subject to increased safeguards. The scope of the order–making power has also been widened to take in central and local government and public authorities, and would be applicable to legislation which is two years old. It would be possible to amend administrative and minor detail by subordinate provisions orders.

The Deregulation Committee in the House of Commons and the Delegated Powers and Deregulation Committee in the House of Lords examine deregulation orders under a stringent scrutiny procedure. The three-stage process proposed for RROs is very similar to that which has applied to deregulation orders. The three stages are: initial departmental consultation; committee consideration of a proposal for an order; and approval of a draft order.

The deregulation procedure and the work of the parliamentary deregulation committees have been generally extolled as an effective form of legislative scrutiny. It has been suggested by some commentators that the procedure could be used as a model in other areas.

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# I The *Regulatory Reform Bill [HL]*

## A. Background

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

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

The Bill's main principles have received a great deal of close attention. One of the main objectives of the Bill is to remove some of the barriers to the wider application of the deregulation order-making power under sections 1-4 of the DCOA. The *Explanatory Notes* set out the main changes tahat the Bill seeks to introduce:

> 13. There are a number of differences between the proposed new order-making power and the power under the DCOA. Orders under the new power, which are expected to be called regulatory reform orders, will be capable of:
>
> - making and re-enacting statutory provision;
> - imposing additional burdens where necessary, provided they are proportionate, that the order also removes or reduces other burdens and that the extent to which other burdens are removed makes it desirable to make the order;
> - removing inconsistencies and anomalies in legislation, provided the order also removes or reduces other burdens;
> - dealing with burdensome situations caused by a lack of statutory provision to do something;
> - applying to legislation passed after the Bill if it is at least two years old when the order is made and has not been amended in substance during the last two years;
> - relieving burdens from anyone, including Ministers and government departments but not where only they would benefit; and
> - allowing administrative and minor detail to be further amended by subordinate provisions orders, subject to either negative or affirmative resolution procedure.

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

In order to ensure the maintenance of appropriate safeguards, the "necessary protection" test from the DCOA is carried over into the *Regulatory Reform Bill [HL]*. In addition, further tests are introduced, summarised in the *Explanatory Notes*:[2]

> […] that no order should prevent anyone from exercising an existing right or freedom which they might reasonably expect to continue to exercise (the "reasonable expectations" test). Any burdens imposed by an order must be proportionate to the benefits expected from them. In addition to the objective of proportionality in clause 1, two further stringent tests (fair balance and desirability) apply if an order would increase or impose a burden. The requirements for extensive public consultation and thorough scrutiny by two Parliamentary Committees will remain, but Ministers bringing forward regulatory reform orders will be required to present more explanatory information to Parliament than they did with deregulation orders, to reflect the wider powers and additional safeguards.

The *Regulatory Reform Bill [HL]* in its current form traces its origins to March 1999, when the Cabinet Office issued a consultation document on its proposals to extend the provisions in the DCOA.[3] The Government identified seven ways in which it felt the scope of the order-making powers in sections 1-4 of the DCOA could be amended to remove perceived constraints while maintaining and improving the safeguards (being the provisions for public consultation, detailed parliamentary scrutiny and the need to maintain necessary protection in the legislation):[4]

- allowing a small increase in burdens on some parties if it removes a greater burden on others;
- removing ambiguities in the law;
- permitting restrictions to be removed from the regulators as well as the regulated to achieve more general "Better Government" objectives;
- extending the power to regulations under the European Communities Act 1972;
- permitting changes to restrictions imposed by common law;
- extending the power to post 1994 legislation; and
- permitting orders to be progressed if the committees issue reports before the end of the full 60 day initial scrutiny period.

Some 45 responses to the consultation were received, including formal reports from the parliamentary deregulation committees,[5] both of which supported the general principle of extending the order-making powers, but with reservations on specific proposals. The Government issued a summary of responses in September 1999**,** which included details of

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2 *Explanatory Notes,* Bill 51- EN, para 14. The safeguards are considered more fully in Section II below.

3 *Proposed Amendments to the Deregulation and Contracting Out Act 1994: a Consultation Document*, Cabinet Office, Mar 1999

4 *ibid*, Summary

5 HC 324 1998-99 and HL 55 1998-99

the proposed next steps,[6] and also responded separately to the parliamentary deregulation committees.[7] In light of the consultation exercise, and particularly the reports of the parliamentary committees which had also consulted and taken evidence, the Government withdrew some proposals and amended others, as summarised in the Cabinet Office's document:[8]

- the proposal to allow the use of orders to remove burdens imposed by common law has been withdrawn;
- the proposal to allow orders to apply to regulations under section 2(2) of the European Communities Act 1972 has been re-cast;
- instead of both the above proposals the Government intends to introduce a more focussed provision which would allow Ministers to use orders to amend, extend or supplement statutory provision so as to further enable or facilitate things which the provision in question does not prohibit but which could not otherwise be done;
- the Government does not intend to carry forward the proposal to amend the scrutiny procedure for orders;
- the proposal on clarification of the law has been subsumed by a wider approach, which stemmed from the House of Lords Delegated Powers and Deregulation Committee's suggestion that a power should be included to fast-track uncontroversial Law Commission proposals. The revised proposal will allow certain proposals from the Law Commission and others which are aimed at modernisation, clarification and simplification of the law to be progressed via the order-making power.

The other proposals were carried forward as described in the original consultation document:

- the proposal to allow deregulation orders to impose limited additional burdens in the interests of the greater good;
- the proposal to allow the use of deregulation orders to clarify the law;
- the proposal to allow the use of deregulation orders to remove or reduce burdens on government;
- the proposal to allow the order-making power to apply to legislation passed after 1994.

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[6] *Proposed Extension of the Deregulation and Contracting Out Act 1994: summary of responses to the Government's consultation exercise and proposed next steps*, Cabinet Office, Sept 1999

[7] Select Committee on Delegated Powers and Deregulation (HL), *Proposed Amendments to the Deregulation and Contracting Out Act 1994: Government Response and Further Report*, 27 Oct 1999, HL 111 1998-99, and Select Committee on Deregulation, *Government Response to the Deregulation Committee's First Special Report, session 1998-99, on the Future of the Deregulation Procedure*, 24 Jan 2000, HC 177 1999-2000

[8] *Proposed Extension of the Deregulation and Contracting Out Act 1994: summary of responses to the Government's consultation exercise and proposed next steps*, Cabinet Office, Sept 1999

The proposals were duly incorporated into a draft Bill, published in April 2000;[9] again, both parliamentary deregulation committees responded to the draft Bill.[10] This extensive pre-legislative scrutiny has provided an opportunity for evaluation of the deregulation process (see Section VI below) and for detailed and measured consideration of the main issues in relation to the proposed widening of the order-making powers contained in the *Regulatory Reform Bill [HL]* (considered in Section II below). A short commentary on the Bill as an example of pre-legislative scrutiny appears in Section VII below.

The Bill was announced in the Queen's Speech for the 2000/01 session. The *Regulatory Reform Bill [HL],* identical to the draft Bill, was introduced in the House of Lords in on 7 December 2000[11] and had its second reading on 21 December 2000.[12] The committee stages took place on 23 and 25 January 2001,[13] report stage on 13 February[14] and third reading on 19 February.[15] The Committee on Delegated Powers and Deregulation produced a useful report on the passage of the Bill through the House of Lords.[16]

In addition to the proposed changes to the deregulation order-making power, the Bill's other main objective is to replace section 5 of the DCOA, which deals with enforcement of regulations, with a reserve power for ministers to set out a code of good practice in enforcement. This policy was also the subject of a consultation document published on 28 September 1999, entitled *Proposals to improve the quality of enforcement services: a consultative document on section 5 of the DCOA 1994*.[17] The Lords Delegated Powers and Deregulation Committee commented briefly on this proposal in its 28th report of 1998-99.[18] The Government's response to the consultation exercise was published on 18 April 2000.[19] Further details on the enforcement provisions appear in the accompanying paper - *The Regulatory Reform Bill[HL]: background to red tape issues*.[20]

References to all the relevant papers and reports connected with the consultation exercises and the draft bill appear as Appendix A to this paper. Appendix B lists 51 potential regulatory reform orders (RROs) which could be brought forward under the order-making power in the Bill.

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[9] *Publication of the Draft Regulatory Reform Bill*, Cm 4713, April 2000
[10] HL 61 1999-2000, HC 488 1999-2000, HL 86 1999-2000 and HC 705 1999-2000
[11] HL Bill 2 2000-01, with *Explanatory Notes*
[12] HL Deb 21 Dec 2000 Vol 620 c 850-902
[13] HL Deb 23 Jan 2001 Vol 621 c 161-201, 218-52 and HL Deb 25 Jan 2001 Vol 621 c 359-422
[14] HL Deb 13 Feb 2001 Vol 622 c 146-216
[15] HL Deb 19 Feb 2001 Vol 622 c 513-39
[16] Select Committee on Delegated Powers and Deregulation (HL), *Regulatory Reform Bill [HL]: further report on the Bill's passage through the House of Lords*, 21 Feb 2001, HL 38 2000-01
[17] *Proposals to improve the quality of enforcement services – A consultative document on Section 5 of the Deregulation and Contracting Out Act 1994*, Cabinet Office, Sept 1999
[18] HL 111 1998-99
[19] *Government's Response to the Consultation Exercise on Proposed Amendments to Section 5 of the Deregulation and Contracting Out Act*, Cabinet Office, April 2000
[20] Research Paper 01/26

## B. The main provisions of the Bill

The main clauses in the Bill can be categorised into four distinct groups. The first group, consisting of clauses 1 – 3, contains the main regulatory reform order-making power:[21]

- **Clause 1** sets out the order-making power and the context within which it will operate.

- **Clause 2** explains what is meant by 'burden' and related terms.

- **Clause 3** sets out the tests that have to be met by proposed orders, and limits the level of penalties that can be imposed for a new criminal offence created by an order under the power.

The second group, consisting of clauses 4 to 8, is concerned with the mechanics of order-making:[22]

- **Clause 4** provides that orders shall be made by affirmative resolution, and sets out the subordinate provisions order-making procedure.

- **Clause 5** details the consultation process required for each proposed order.

- **Clause 6** details the information that the Minister must provide to Parliament when the proposed order is presented for scrutiny.

- **Clause 7** sets out the disclosure arrangements for representations made during consultation.

- **Clause 8** deals with the parliamentary scrutiny of draft orders.

The third group, consisting of **clauses 9 to 11**, makes provision for Ministers to make codes of good practice in relation to enforcement matters.

The fourth and final group of clauses, consisting of **clauses 12 to 15**, deals with supplementary matters.

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[21] a flow chart of the initial checks on *vires* is provided in the *Explanatory Notes* – Bill 51-EN, Appendix F

[22] flow charts of the process are provided in the *Explanatory Notes* – Bill 51-EN, Appendix G and H

# II Regulatory Reform: the Main Issues

## A. General

In addition to reports on individual deregulation orders under the DCOA, both the Commons and the Lords Committees have produced reports on their work and on the future of the deregulation procedure, which provide extremely useful background material to the process. In practice the Committees have concentrated on three main areas in their consideration of individual deregulation orders:

- the nature and impact of the burden;
- the maintenance of the levels of necessary protection; and
- the adequacy of the department's consultation.

In its report following the introduction of the *Regulatory Reform Bill [HL]* in the House of Lords the Committee on Delegated Powers and Deregulation concluded:[23]

> The order-making power in the Regulatory Reform Bill provides Parliament and Government with the possibility of effecting substantial reform of the statute book by an expansion of the procedures which have been tried and tested through the operation of the Deregulation and Contracting Out Act 1994. The potential gains are considerable - but so too, without stringent safeguards, would be the risks inherent in this unprecedentedly wide power. We consider the essential question for the House is whether the potential gains of effective regulatory reform can be achieved whilst providing sufficiently strong safeguards against potential abuse of the power.

The main issues highlighted by the Committees in considering the proposals to introduce a wider order-making power in regulatory reform orders (RROs) are examined below, together with relevant material from the debates in the House of Lords.

## B. Burden

**Those affected by a burden**

Under s1(1) of the DCOA an order could remove or reduce a burden "affecting any person in the carrying on of any trade, business or profession or otherwise" without removing any necessary protection. The definition of "otherwise" has been held to cover charities, voluntary organisations and individuals. However the proposal for the Deregulation (Civil Aviation Act 1982) Order, which would have removed a burden from a public regulatory authority, was considered by the parliamentary deregulation committees to be outside the scope of the DCOA. The application of the regulatory

[23] Select Committee on Delegated Powers and Deregulation (HL), *Regulatory Reform Bill [HL]*, 18 Dec 2000, HL 8 2000-01, para 21

reform order-making power would extend not only to those in business, but to "persons in the carrying on of any activity" (clause 1(1)), thus taking in **local and central government** (but not where only ministers or government departments would benefit). Professor David Miers,[24] in his evidence to the Commons Deregulation Committee on the initial proposals, drew attention to the fact that while the Government's consultation document implied that the burdens to be removed from government would be small, there could be no restriction on future government actions.[25] He questioned whether it was appropriate that public authorities' duties, where set in primary legislation, should be able to be varied by government other than by a further Act of Parliament. The Committee concluded, however that the safeguards of the scrutiny process would ensure that the power was not abused in this way.[26]

**Increase or transfer in burden**

The regulatory reform order (RRO) power would allow an increase in burden if the order were also to remove a burden (subject to increased safeguards, see below). Some concern has been expressed about the potential effect on **small businesses** of transferring burdens.[27] The Government proposes new tests to maintain and improve the safeguards: `where ministers are to impose a burden, they must satisfy the "proportionality" test,[28] the "desirability" test and the "fair balance" test. These new tests are in addition to the tests of "necessary protection" and "reasonable expectation" that apply in all cases, together with a commitment to produce a full regulatory impact assessment for any new or transferred regulatory burden.

**Legislation which can be amended by RROs**

Deregulation orders can only be made regarding statutes enacted before October 1994. RROs would be able to be applied to primary legislation which was passed at least two years before the order was made, and to deregulation orders and RROs themselves (Clause 2(1)).

**Anomalies and inconsistencies in legislation**

The provisions to allow the removal of anomalies and inconsistencies in legislation did not prove controversial and are likely to follow recommendations from the Law Commission. The Commons Deregulation Committee did, however, make the point that this should not just be an exercise in re-drafting the law, but that any order was necessary in order to remove a burden of ambiguity.[29]

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[24] Professor of Public Law at Cardiff Law School

[25] HC 324 1998-99, Q 101

[26] *ibid*, para 29

[27] eg, see Lord Haskins' evidence to the Committee on Deregulation, *The Future of the Deregulation Procedure*, HC 324 1998-99, Q 26; HL Deb 21 Dec 2000 Vol 620 c 884

[28] "where the burden is proportionate to the benefit which is expected to result from its creation" - clause 1(1)(b) and 1(1)(c)(ii)

[29] HC 324 1998-99, para 23

## C. Protection and safeguards

The order-making power of the Bill is very wide, which leads to the need for effective safeguards against potential abuse. [30] The power is constrained by various tests specified in the Bill:

- **necessary protection** (clause 3(1)(a)) - The minister making an order must be of the opinion that it does not remove any necessary protection.[31] This test was also contained in the DCOA.

- **reasonable expectations** (clause 3(1)(b)) **-** This is a new test; one which was recommended by the Commons Deregulation Committee in its response to the Government's initial consultation on the extension of the DCOA.[32] It demands that the minister making the order must be of the opinion that it will not prevent an individual from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise.[33]

- **proportionality** (clause 1(1)(b) and (c)) - The imposition of any new or increased burden must be proportionate to the benefit which is expected to result. [34] There was much concern during the Bill's passage in the Lords about the freestanding nature of the power to increase burdens in clause 1(1)(c), without any requirement, on the face of the Bill, to link it to the reduction of a burden elsewhere. Liberal Democrat amendments were debated during the Committee stage in the Lords to remedy this perceived risk. Although the amendments were not agreed to, the Government accepted the principle of linkage and Lord Goodhart's amendments were agreed at report stage to address the issue (see the "desirability test" below).[35]

- **fair balance** (clause 3(2)(a)) - In the case of the imposition of new or increased burdens, the minister must be of the opinion that the provisions of an order, taken as a whole, strike a fair balance between the public interest and the rights of the individual.[36]

- **desirability** (clause 3(2)(b)) - This new test was inserted into the Bill as a result of an amendment in the Lords. In the case of the imposition of a new or increased burden,

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[30] An overview of the procedural and legal safeguards is provided in the *Explanatory Notes* – Bill 51-EN, Appendix D.

[31] see also *Explanatory Notes* Bill 51-EN, para 66

[32] Select Committee on Deregulation, *The Future of the Deregulation Procedure*, 20 April 1999, HC 324 1998-99, para 49

[33] see also *Explanatory Notes* Bill 51-EN, para 67

[34] see also *Explanatory Notes* Bill 51-EN, para 45

[35] For further details see Select Committee on Delegated Powers and Deregulation (HL), *Regulatory Reform Bill [HL]: further report on the Bill's passage through the House of Lords*, 21 Feb 2001, HL 38 2000-01, paras 23-7.

[36] see also *Explanatory Notes* Bill 51-EN, para 69

> the minister must be of the opinion that it is desirable to make the order, either in terms of the removal or reduction of a burden elsewhere, or in terms of other benefits for those persons currently affected by the burden.[37]

Under clause 6, ministers would have to justify, according to these tests, the effect of any new or increased burdens in the explanatory material to be laid before Parliament.

In addition to these tests, there are other safeguards: the requirements for extensive **consultation** remain, as do the stringent **parliamentary scrutiny procedures**; ministers would make a statement of compatibility with the **European Convention on Human Rights** on each order; and a **regulatory impact assessment** would accompany each order.

Under the deregulation procedure, although there was no requirement in the DCOA for them to do so, the Government has always taken heed of an **adverse report** from either parliamentary committee and has amended or withdrawn the proposed order. During the second reading debate on the *Regulatory Reform Bill [HL]* in the House of Lords, Lord McIntosh of Haringey, Government Deputy Chief Whip, confirmed the intention to continue this practice:[38]

> […] it gives me the opportunity to repeat the assurance given by my noble and learned friend in May of last year. At that time the Government undertook to continue to respect the convention that no measure under the Deregulation and Contracting Out Act should be forced through in the face of the committee's opposition. The noble Lord, Lord Goodhart, and the noble Viscounts, Lord Goschen and Lord Bridgeman, asked for that assurance and I am happy to repeat the undertaking today.

Furthermore, there was a convention relating to deregulation orders that should a **motion hostile to an order** be carried in the House of Lords, any subsequent motion on the order itself would not be moved. Lord McIntosh also confirmed this undertaking during the Lords Committee stage:[39]

> As my noble and learned friend Lord Falconer pointed out in our debate on Tuesday last, there is a government undertaking that, in the event of a Motion amending a draft deregulation order being agreed by the House, the Motion for the draft order would not be moved. That was agreed by the previous government on 20th October 1994 and this Government have confirmed it.

Another issue that occasioned some debate in the Lords was the case for the provision of a "**sunset clause**" in the Bill. A sunset clause ensures that after a set period of time the

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[37] see also *Explanatory Notes* Bill 51-EN, para 70
[38] HL Deb 21 Dec 2000 Vol 620 c 900
[39] HL Deb 25 Jan 2001 Vol 621 c 371

provisions would lapse unless Parliament extends them. The Committee on Delegated Powers and Deregulation (HL) had previously addressed this issue and concluded that a simple sunset provision would be too crude and was not appropriate:[40]

> Instead we suggest a further safeguard which the House may wish to consider, which would entail the amendment of the bill to provide for a sunset provision including the following features:
>
> - limiting the operation of the Act to a maximum period of five years, unless renewed by an affirmative instrument for a further period;
> - requiring a report on the operation of the Act to be laid before Parliament at the same time as the draft affirmative renewal instrument, thereby ensuring that the Act is kept under frequent review and that the powers have been both appropriately and effectively used: we also envisage this report including a report on the operation of orders made under the Act, including any need for their amendment.

The Government did not accept the suggestion of a sunset provision or of a statutory requirement to lay before Parliament a **report on the operation of the Act**, but Lord Falconer of Thoroton, Cabinet Office Minister, gave the following undertaking:[41]

> However, I can and do undertake on behalf of the Government that a Minister of the Crown will report to this House three years after enactment - I say three years rather than two years; I am not sure that that is a critical point between us - on the operation of the regulatory format should it become an Act. I undertake that that report will cover the operation of the order-making process and any associated constitutional and procedural issues. As the debates to date have indicated, these are areas of key concern to your Lordships' House. It is right that the government of the day should address them fully.

As a last resort, a regulatory reform order would be subject to judicial review if it were outside the *vires* of the legislation.

## D. Large and controversial measures

During the Lords debates on the Bill, some concern was expressed that the scope of the order-making power was not expressed tightly enough and the procedure could potentially be used for subjects not appropriate for secondary legislation. While there is nothing on the face of the Bill to define what is "appropriate", the *Explanatory Notes* indicate that the procedure would not be used for politically controversial measures and give examples of matters which would be considered inappropriate: [42]

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40 Select Committee on Delegated Powers and Deregulation (HL), *Regulatory Reform Bill [HL]*, 18 Dec 2000, HL 8 2000-01, paras 19-20

41 HL Deb 13 Feb 2001 Vol 622 c 215

42 Bill 51-EN, para 42

- proposals aimed at constitutional change;
- changes to the judicial system;
- changes to the structure or organisation of local government;
- changes to the Ombudsmen procedures;
- reform of highly controversial employment law.

This issue was discussed during the Bill's passage through the House of Lords and the Government gave several undertakings that the procedure would not be used for "highly controversial or party-political measures",[43] and only for matters which were "not politically controversial".[44] Lord Falconer further stated on 13 February 2001:[45]

> As has been repeatedly stated by everyone involved, the power in the Bill is not suited to large and controversial measures. The entire procedure contained in the Bill would weed out such proposals. A highly contentious issue would come up against serious problems during the consultation period and the Minister, obliged to set all this out in the document he placed before Parliament, would have to reflect that explicitly. The scrutiny procedures in Parliament, involving careful examination by committees and the co-equal status of the two Houses, are such that any Minister would obviously be ill-advised to choose this route.

In this context, the *Explanatory Notes* refer also to the thorough consultation and scrutiny procedures and to the effective veto that the parliamentary committees enjoy over individual orders.[46]

Further background to the debate on this issue is given in the Committee on Delegated Powers and Deregulation's report on the passage of the Bill through the Lords.[47]

## E. Subordinate provisions orders

The Bill allows for administrative and minor details to be further amended by subordinate provisions orders, made by statutory instrument. The *Explanatory Notes* give more detail on subordinate provisions orders (which might be used for such issues as details on application forms and fees) and indicate that such provisions would usually be included in schedules to the main part of an RRO.[48] The original proposal in the draft Bill, carried forward in clause 4(6) of the Bill as presented to Parliament, was that such instruments would be subject to the negative procedure. The Commons Deregulation Committee had

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[43] HL Deb 21 Dec 2000 Vol 620 c 852
[44] HL Deb 23 Jan 2001 Vol 621 c 209
[45] HL Deb 13 Feb 2001 Vol 622 c 186
[46] Bill 51 – EN, para 41
[47] Select Committee on Delegated Powers and Deregulation (HL), *Regulatory Reform Bill [HL]: further report on the Bill's passage through the House of Lords*, 21 Feb 2001, HL 38 2000-01, paras 9-14
[48] Bill 51-EN, paras 75-84

objected to this,[49] and during the Lords debates on the Bill an amendment was moved by Lord Borrie to allow for subordinate provisions orders to be subject either to the negative or affirmative procedure. This amendment was accepted by the Government.

## F. Devolution

The Bill adheres to the principles of the different devolution settlements. Itwould apply to Scotland in reserved matters only. For devolved matters, the Scottish Ministers and the Parliament retain powers under the *Deregulation and Contracting Out Act 1994*, (while the provisions in that Act are repealed for the rest of the UK).

The National Assembly for Wales would not have the power to make regulatory reform orders, but it would have to be consulted on all matters relating to Wales, and it would have to give explicit consent to any order that modifies or removes any of its functions.[50] In line with the Lords Committee on Delegated Powers and Deregulation's recommendation[51] the Bill proposes the delegation to the National Assembly for Wales only the reserve power to make a code of enforcement practice.

The Bill applies to Northern Ireland to the extent that UK law has effect there. The definition of "legislation" in clause 1(2)(a) excludes Northern Ireland legislation, which was implemented by way of Orders in Council during direct rule. The Northern Ireland Assembly would not have the power to make regulatory reform orders, but would retain the power to make deregulation orders under the *Deregulation and Contracting Out (NI) Order 1996* (which mirrored the DCOA provisions).

# III Parliament and Delegated Power

Library Research Paper 94/16 was prepared for the second reading of the *Deregulation and Contracting Out Bill 1993-94* and provided a comprehensive briefing on the deregulation initiative. It also considered in detail the constitutional and parliamentary issues surrounding the deregulation order provisions (including the nature of delegated power, and Henry VIII clauses). Research Paper 94/116 covered the development of the proposals for parliamentary scrutiny of deregulation orders.

The current paper will not repeat all the constitutional and procedural points in the previous papers, but will concentrate on the procedures themselves, starting with only a brief discussion of the background.

[49] eg HC 488 1999-2000, paras 47-54; HC 705 1999-2000, para 8
[50] clause 1(2)(5)
[51] HL 130 1999-2000

## A. Background

Until the passing of the *Deregulation and Contracting Out Act 1994* (DCOA), the usual procedure for amending or repealing an Act of Parliament (except in rare and specific circumstances) was *via* another piece of primary legislation. However, statutory provisions do exist which enable the repeal or amendment of primary legislation by way of delegated (or secondary) legislation. Such provisions are known as "Henry VIII clauses". The House of Lords Select Committee on the Scrutiny of Delegated Powers in its first report defined a Henry VIII clause as:[52]

> … a provision in a bill which enables primary legislation to be amended or repealed by subordinate legislation, with or without further Parliamentary scrutiny.

The Committee on Ministers' Powers (the Donoughmore Committee), set up in 1929 to examine the delegation of large amounts of legislative power to the executive, explained the derivation of the term:[53]

> This class of enactment has acquired the nickname of "the Henry VIII clause" because that King is regarded popularly as the impersonation of executive autocracy. Indeed it may be considered to resemble the famous Statute of Proclamations, 1539, which gave the King power to legislate by proclamation until it was repealed on Henry's death in 1547. The comparison is certainly far-fetched.

While Henry VIII clauses in bills are relatively rare, the power was adopted in a substantial way with the introduction of the DCOA. This Act gave government ministers a new power to amend or repeal, by secondary legislation, a provision in primary legislation which imposed a burden "affecting any person in the carrying on of any trade, business or profession or otherwise", subject to the safeguard that it did not remove "any necessary protection". Sections 1 to 4 of the DCOA set out the system for "deregulation orders",[54] which, because of the substantial power given to ministers, were to be subject to a rigorous parliamentary scrutiny procedure.

One crucial difference between primary and secondary legislation is the general rule that secondary legislation cannot be amended by Parliament. The exacting procedure for Parliament's examination of deregulation proposals and draft orders, which does allow for amendments, was introduced in response to concern that ministers should be properly accountable for the sweeping powers given to them in the 1994 Act. In practice, the procedures developed to examine deregulation orders have generally been extolled, by

[52] HL 57 1992-93, para 10

[53] Cmd 4060, 1932, pp 36. An examination of the Committee's consideration in this respect is contained in Library Research Paper 94/16.

[54] although the term did not actually appear in the Bill as such

both Parliament and the Government, as an exemplary model for scrutiny of legislation. Indeed, support has also been expressed for extending this so-called “super affirmative” procedure to other types of delegated legislation.[55]

## B. Parliamentary consideration of deregulation orders

The *Deregulation and Contracting Out Act 1994* (DCOA) provided for a two stage process for parliamentary scrutiny of deregulation orders: the respective Committees in each House examine the orders when first proposed, and again when subsequently laid in draft. At both stages the Committees report on whether the proposed order should proceed. Further details on the scrutiny procedure are outlined below. In all cases the parliamentary scrutiny must be preceded by consultation.

The parliamentary consideration proposed under the *Regulatory Reform Bill [HL]* is unchanged from that which has applied under the DCOA.[56] Neither the 1994 Act nor the Bill specifies which committees must examine the proposals or which specific parliamentary procedures must be applied to consideration of the draft orders. What is specified is the timetable: proposals "in the form of a draft of the order" must be considered within a period of 60 days (with the same provisos about prorogation etc as apply to other statutory instruments).[57]

Under the provisions of the *Regulatory Reform Bill [HL]*, ministers would be required to present more explanatory information to Parliament (see below). There is, however, a more significant addition to the regulatory reform provisions and Parliament's role therein: Ministers' power to make "subordinate provisions orders", which, as originally proposed in the first printing of the Bill, would be subject to the negative procedure.[58]

Since the first deregulation proposal was deposited on 5 April 1995, 48 deregulation orders have been made although comparatively few have been brought forward in recent sessions - a fact that both Committees had expressed concern over.[59]

While the parliamentary deregulation committees regularly recommended amendments to proposed orders, they rejected a proposal for an order in only three instances. The reasons for the rejection in each of these cases are summarised below. Both Committees rejected the first two, (although the reasons given by the respective Committees were not the same); the Commons Deregulation Committee rejected the third:

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55 see Section VI below

56 the provisions in clause 8 of the Bill mirror those in section 4 of the Act

57 s8(3) - […] no account shall be taken of any time during which Parliament is dissolved or prorogued or during which either House is adjourned for more than four days

58 this was subsequently amended in the Lords; see Section VI below

59 a list of deregulation orders made to date appears as Annex A in the *Explanatory Notes*, Bill 51-EN

- **Sunday Dancing (Deregulation) Order 1995** – The period of time allowed for consultation was not adequate, and necessary protection would not be maintained.[60] The Lords Committee also considered it an inappropriate use of the order-making power.

- **Deregulation (Civil Aviation Act 1982) Order 1997** – The Lords Committee considered this order *ultra vires*; the Commons agreed, and also considered it an inappropriate use of the order-making power.[61]

- **Deregulation (Consumer Credit) Order 1997** – The Commons Deregulation Committee considered that necessary protection would not be maintained.[62]

# IV The Parliamentary Deregulation Committees

When the Government published the *Deregulation and Contracting Out Bill* in January 1994, they also published their proposals for parliamentary scrutiny of deregulation orders.[63] These proposals included the recommendation that a new scrutiny committee should be set up in each House to examine deregulation proposals and draft orders. At the same time the Procedure Committees of both Houses were informed and published reports on the matter.[64] The committees which were subsequently established are described below.

Deregulation orders proceed concurrently through both Houses. The deregulation committees work independently of each other and there is no formal procedure for resolving differences of opinion, should any arise. Because deregulation orders are secondary legislation, the *Parliament Acts* procedure could not be applied. The Committees make clear, however, that close working relationships exist between them. As the Lords Committee states:[65]

> […] In particular, there is a complete exchange of papers between the two Committees, including the exchange of evidence from witnesses, thereby avoiding unnecessary duplication of effort for all concerned both outside and

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[60] Deregulation Committee sixth report, 31 Oct 1995, HC 817 1994-95; Scrutiny of Delegated Powers Select Committee (HL) fifteenth report, 25 Oct 1995, HL 102 1994-95

[61] Deregulation Committee twelfth report, 11 Mar 1997, HC 347 1996-97; Delegated Powers and Deregulation Select Committee (HL) thirteenth report, 5 Feb 1997, HL 40 1996-97 and nineteenth report, 5 Mar 1997, HL 59 1996-97

[62] Deregulation Committee thirteenth report, 18 Mar 1997, HC 439 1996-97; Delegated Powers and Deregulation Select Committee (HL) thirteenth report, 5 Feb 1997, HL 40 1996-97 and twenty-first report, 19 Mar 1997, HL 70 1996-97

[63] *DTI explanatory guide to the Bill*, Annex A

[64] HC 238 1993-94 and HL 58 1993-94

[65] Select Committee on Delegated Powers and Deregulation, *Special Report for 1999-2000: the Committee's work*, HL 130 1999-2000, para 7

> within Parliament. We find this close co-operation between the Committees of the two Houses invaluable.

The question of committee resources may have to be looked at by each House following the extension of the order-making power for regulatory reform.

## A. House of Commons: the Deregulation Committee

There was no existing committee in the House of Commons which could naturally take on the role of scrutinising Deregulation orders. The Procedure Committee recommended the establishment of a new select committee for the purpose;[66] the Government accepted this recommendation,[67] and a new standing order was agreed in November 1994.[68] The remit and powers of the Deregulation Committee in the House of Commons is governed by Standing Order No 141.[69] There are 18 Members on the Committee.

In its first report, the Deregulation Committee set out its understanding of its role in scrutinising deregulation orders and fleshed out much of the details as to how the Committee would operate.[70]

The Deregulation Committee examines each deregulation proposal against nine criteria, as set out in Standing Order No 141 (5) A, to see whether they:

> *(a)* appear to make an inappropriate use of delegated legislation;
> *(b)* remove or reduce a burden or the authorisation or requirement of a burden;
> *(c)* continue any necessary protection;
> *(d)* have been the subject of, and take appropriate account of, adequate consultation;
> *(e)* impose a charge on the public revenues or contain provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribe the amount of any such charge or payment;
> *(f)* purport to have retrospective effect;
> *(g)* give rise to doubts whether they are intra vires;
> *(h)* require elucidation or appear to be defectively drafted;
> *(i)* appear to be incompatible with any obligation resulting from membership of the European Union.

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66 Select Committee on Procedure, *Parliamentary Scrutiny of Deregulation Orders*, HC 238 1993-94

67 Select Committee on Procedure, *Parliamentary Scrutiny of Deregulation Orders: Government response to the fourth report*, HC 404 1993-94

68 HC Deb 24 Nov 1994 Vol 250 c 764-89

69 reproduced in Annex B to the *Explanatory Notes*, Bill 51-EN

70 Select Committee on Deregulation, *The Deregulation (Greyhound Racing) Order 1995: the proposal*, HC 535 1994-95

Should the *Regulatory Reform Bill [HL]* be passed, the Committee's terms of reference may have to be amended to encompass the wider scope of the order making power in the Bill,[71] and the Committee has also recommended that consideration be given to changing its name.[72] The Committee is about to publish a report on the effect that the regulatory reform provisions would have on its work.[73]

## B. House of Lords: the Delegated Powers & Deregulation Committee

In 1992, following the Jellicoe Report on the work of committees in the House of Lords, a Select Committee on the Scrutiny of Delegated Powers had been established on an experimental basis, with the following terms of reference:[74]

> to report whether the provisions of any bill inappropriately delegate legislative power; or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny

Following the publication of the Government's proposals for parliamentary scrutiny of deregulation orders, the Delegated Powers Scrutiny Committee itself considered how the House of Lords might deal with orders under the *Deregulation and Contracting Out Act* and recommended additional terms of reference:[75]

> To report on documents laid before Parliament under section 3(3) of the Deregulation and Contracting Out Act 1994 and on draft orders laid under section 1(4) of the Act; and to perform, in respect of such documents and orders, the functions performed in respect of other instruments by the Joint Committee on Statutory Instruments.

At the beginning of the 1995-96 session, the remit of the Delegated Powers Scrutiny Committee was accordingly extended, and in 1996-97 its name was changed to reflect its new role: it became the Delegated Powers and Deregulation Select Committee. Unlike the House of Commons the House of Lords did not make a Standing Order specifying the powers and operation of the Delegated Powers and Deregulation Committee.[76] The Committee currently has nine members, and its work is governed by the 1994 Act and the

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[71] eg see the Committee's response to the Government's consultation on the proposed extension to the DCOA, HC 324 1998-99, para 49, where it recommended the addition of the "reasonable expectations" test to the criteria

[72] *ibid*, para 56

[73] Select Committee on Deregulation, *The Handling of Regulatory Reform Orders*, 13 Mar 2001, HC 328 2000-01

[74] Select Committee on Procedure (HL)¸ *The Committee Work of the House*, HL 35 1991-92

[75] Select Committee on Delegated Powers (HL), *Review of the Committee's Work 1993-94*, HL 90 1993-94

[76] However, details relating to that House's approval of Deregulation Orders is incorporated in House of Lords Standing Orders No 40 and 72.

Committee's terms of reference. Thus it considers deregulation orders against the eight criteria used by the Joint Committee on Statutory Instruments:[77]

> (*a*) that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payments;
> (*b*) that it is made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts, either at all times or after the expiration of a specific period;
> (*c*) that it purports to have retrospective effect where the parent statute confers no express authority so to provide;
> (*d*) that there appears to have been unjustifiable delay in the publication or in the laying of it before Parliament;
> (*e*) that there appears to have been unjustifiable delay in sending a notification under the proviso to subsection (1) of section 4 of the Statutory Instruments Act 1946, where an Instrument has come into operation before it has been laid before Parliament;
> (*f*) that there appears to be a doubt whether it is *intra vires* or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
> (*g*) that for any special reasons its form or purport call for elucidation;
> (*h*) that its drafting appears to be defective;

and against four additional criteria, agreed by the Committee itself:[78]

> In performing our scrutiny, we will in particular ask -
> - does the proposal for an order remove or reduce, as required by the Act, a burden or the authorisation or requirement of a burden?
> - does the proposal continue, as required by the Act, any necessary protection?
> - is the matter one which can appropriately be pursued by delegated legislation by means of a deregulation order?
> - has there been proper consultation in accordance with sections 3 of the Act, and has account been taken of what was said?

# V Regulatory Reform Orders: Stages

The parliamentary procedures for scrutinising deregulation orders and the way the committees function are almost entirely within Parliament's own authority to decide. The *Regulatory Reform Bill [HL]*, like the *Deregulation and Contracting Out Act 1994*

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77 from HL Standing Order 73 (2)

78 Select Committee on the Scrutiny of Delegated Powers, *Special Report on Deregulation Orders*, 6 April 1995, HL 48 1994-95, para 25

(DCOA) before it, lays requirements on government relating to the initial consultation, the explanatory documents to be laid before Parliament and the note to be taken of representations, resolutions and reports (of the parliamentary Committees). Parliament is required to complete its consideration of proposals within sixty days. This is the only requirement on the face of the Bill regarding the parliamentary consideration stage.

The parliamentary procedure for the consideration of deregulation orders (and consequently for regulatory reform orders) incorporates some important features:

- pre-legislative scrutiny is built into the procedure
- there is consultation: both by the government and by the Committees themselves
- the Committees have power to recommend amendments to the draft orders

A brief outline of the deregulation procedure follows, together with a commentary on how the provisions of the *Regulatory Reform Bill [HL]* would apply.

## A. Initial consultation

As a preliminary stage, the relevant Government Department must first draft a proposal for the Order and conduct a consultation. Under s3(1) of the DCOA, the requirement was to consult representatives of those who were substantially affected and any other person the minister considered appropriate. This requirement has been expanded in the *Regulatory Reform Bill [HL]*:

> **5.** - (1) Before a Minister makes an order under section 1, he shall-
> (a) consult such organisations as appear to him to be representative of interests substantially affected by his proposals,
> (b) where his proposals relate to the functions of one or more statutory bodies, consult those bodies or organisations which appear to him to be representative of those bodies,
> (c) in such cases as he considers appropriate, consult the Law Commission or the Scottish Law Commission,
> (d) where the provision made by the order would extend to Wales, consult the National Assembly for Wales, and
> (e) consult such other persons as he considers appropriate.

After considering the results of the consultation, the government may decide to change all or part of the proposal, or even withdraw it completely. It was envisaged that if the objections to the proposal during the consultation stage were substantial, then the government would not proceed with a deregulation order but, instead, consider primary legislation.[79] (There have been a few occasions when this has indeed happened). If the process is proceeded with, there follows a two-stage parliamentary process.

[79] see HL 63 1993-94, App 1, para 18 and HL 120 1995-96, Minutes of evidence, para 14, HC 311 1994-95

A new provision is introduced in clause 7 of the Bill, which sets out what should happen when someone responding to a consultation exercise on a proposed order requests that their response should be confidential. Generally, the content of the response can be made in confidence, but the fact that they have made a response should be disclosed.

## B. Proposal for an order

Under s3(3) of the DCOA, when the Government is satisfied with the proposal, it is laid before Parliament, with a detailed *Explanatory Memorandum* describing the proposal and the form and results of consultation. Under the terms of the *Regulatory Reform Bill [HL]* the minister would be obliged to lay more accompanying information before Parliament, as set out in clause 6(2) (as brought from the Lords):[80]

> […]
> (a) the burdens which the existing law affected by the proposals has the effect of imposing,
> (b) how the proposals further the object mentioned in section 1(1)(a),
> (c) whether and, if so, how the proposals also further the objects mentioned in section 1(1)(b), (c) and (d),
> (d) whether the existing law affected by the proposals affords any necessary protection and, if so, how that protection is to be continued,
> (e) whether any of the proposals could prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise and, if so, how he is to be enabled to continue to exercise that right or freedom,
> (f) whether the proposals would have the effect of creating a burden affecting any person in the carrying on of an activity and, if so, how the conditions in section 1(1)(c) and 3(2) are satisfied,
> (g) whether any provisions of the proposed order are being designated as subordinate provisions for the purposes of section 4 and, if so, why they are being so designated,
> (h) whether any savings or increases in cost are estimated to result from the proposals and, if so,-
> (i) the reasons why savings or increases in cost should be expected, and
> (ii) if it is practicable to make an estimate of the amount, that amount and how it is calculated,
> (i) any benefits (other than savings in cost) which are expected to flow from the implementation of the proposals,
> (j) any consultation undertaken as required by section 5(1) or (3),
> (k) any representations received as a result of that consultation, and
> (l) the changes (if any) which the Minister has made to his original proposals in the light of those representations.

[80] Bill 51 2000-01

The Committees have 60 days to consider the proposal and report on it. Each Committee may examine witnesses (who are not confined to those already consulted), call for evidence from the relevant department and consider other representations. The Committees report to their respective House, and they may recommend that the proposal should proceed, not proceed, or proceed only in an amended version. The government must take account of the Committees' reports and any other representations made before finalising the draft Order. The government would then decide, taking into account the views of the Committees, whether or not to proceed with the draft order, and if so, whether to amend the order in light of the Committees' reports.

## C. Draft Order

After the 60 days period for parliamentary consideration has elapsed, a draft deregulation order may be laid, with a statement detailing any "representations, resolution or report" made during the period of parliamentary consideration and any consequent changes made. The Committees consider the draft order again, within 15 sitting days,[81] and make a further report, recommending whether the draft order should or should not be approved.

Under the terms of the *Regulatory Reform Bill [HL]*, a Regulatory Reform Order[82] would finally be made by statutory instrument, following approval by resolution of each House. This is similar to the provision in s. 1(4) the DCOA. The Lords have debated all deregulation orders, but procedure in the Commons varies according to the report of the Deregulation Committee, as set out in Standing Order No 18 (Consideration of Draft Deregulation Orders),[83] as follows:[84]

- Committee approves without division: Question put in House without debate.
- Committee approves with division: Debate in House for up to 1½ hours.
- Committee rejects: Motion in House to disagree with Committee's report, debated for up to 3 hours; if agreed, question then put forthwith on draft Order.

In fact, neither the second or third procedure has yet had to be used for deregulation orders. Where the deregulation committees have recommended amendments to draft orders the government has followed their advice, and both Committees have been able to recommend approval of all orders which have reached this final stage of the process.

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81 this period is specified in the Commons Standing Orders, but not in the Lords, although the Lords Committee does generally report within the same timescale

82 not actually named as such in the Bill, but commonly shortened to RRO during debate in the House of Lords

83 on parliamentary web site at - http://pubs1.tso.parliament.uk/pa/cm199900/cmstords/pubbs--b.htm#18 also reproduced in Annex B to the Explanatory Notes on the Regulatory Reform Bill

84 from the *Short Guide to Procedure and Practice*, Dept of the Clerk of the House

# VI An Evaluation of the Deregulation Procedure

The scrutiny work undertaken by the work of the deregulation committees in the Commons and the Lords has been the subject of much praise, as have the stringent but effective deregulation procedures.

The House of Lords Delegated Powers Committee was originally modelled largely on the Australian Senate's Scrutiny of Bills Committee, and it compared itself with that Committee in its report of work for 1999-2000.[85] Part of the success of the deregulation procedures might be explained by some of the points illustrated: eg, there was a high degree of consensus on the Committee, which had never divided on party lines; and reports were always unanimously agreed. Further points, highlighted in a comparison of the Committee with the New Zealand Parliament's Regulations Review Committee, also reveal similarities. Again, these may be relevant to the success of the procedure:[86]

- there is a very high success rate for their recommendations;
- both Committees have to work hard and fast;
- the Committees' recommendations are confined to achieving specific objectives within the terms of reference;
- there has never been a vote in either Committee.

The Clerk of the House of Lords Delegated Powers and Deregulation Committee has recently expressed the view that part of the reason for the success of the Committee is that it is little known outside Westminster and Whitehall:[87]

> [...] generally, the Committee's work is low profile, and it makes no attempt to court publicity by, for example, issuing press releases. The constructive approach to the Committee's reports, and their low key, non-confrontational language must make it easier for ministers to accept the Committee' recommendations.

On the efficacy of the parliamentary scrutiny procedures she further states:[88]

> Far from cutting out the opportunity for parliamentarians to go through legislation line by line – an opportunity which, in practice, may be thwarted either by parliamentary procedures such as guillotining or selecting amendments, by parliamentary practices such as late night sittings, or by the activities of the Whips – in the Committee's view the deregulation procedure has enhanced detailed parliamentary scrutiny. It has been used in the most part for proposals

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85 Select Committee on Delegated Powers and Deregulation, *Special Report for 1999-2000: the Committee's work*, HL 130 1999-2000, paras 8-9

86 *ibid*, para 10

87 Philippa Tudor, "Secondary Legislation: second class or crucial", *Statute Law Review*, Vol 21 (3), 2000, pp 153

88 *ibid*, p 155

> which might otherwise not have seen the parliamentary light of day or might have received only the most cursory scrutiny.

An excellent study on the deregulation procedure has been produced by Professor David Miers, who also gave evidence to the House of Commons Deregulation Committee.[89] Overall, Professor Miers concludes that the scrutiny procedures have worked well:[90]

> The parliamentary consensus is that the deregulation procedure is a success. It offers departments the opportunity to achieve useful amendments to primary legislation where the chances of their being achieved via the normal route would, because of pressure on the timetable, be slim or non-existent. It offers Parliament the opportunity to conduct detailed and effective scrutiny of proposed changes to primary legislation a scrutiny often notably absent in the passage if a Bill. It is a co-operative venture between government and Parliament whose success has encouraged both the Committees and the government to seek its extension to other areas.

As we have seen, the Government has sought in the *Regulatory Reform Bill [HL]* to extend the procedure, widening the scope beyond simply reducing burdens, and widening the application to include not only business but also central and local government and statutory agencies. Professor Miers suggests that the procedure could be extended even further and be applied to other categories of legislation, giving three main examples:[91]

- **Remedial orders under the *Human Rights Act 1998***

Under s10 of the *Human Rights Act 1998*, a minister may make an order to amend primary or secondary legislation which is declared to be incompatible with the European Convention on Human Rights. The Lords Committee on Delegated Powers and Deregulation had referred to the possibility of using the deregulation procedures as a model for these "remedial orders" in its consideration of the Bill:[92]

> 24. The bill, quite rightly in the Committee's view, requires the affirmative resolution procedure. This procedure, however, does not allow the House to amend an order. Given that the power has to be open-ended in order to meet any need that could arise, and that it might be used to make extensive changes to existing legislation, the House may wish to consider whether there is a case for developing a new procedure to scrutinise such orders modelled on that for the second stage parliamentary scrutiny of deregulation orders. Such a procedure could allow for a limited period in which the proposal to make a remedial order could be considered by both Houses of Parliament, with the opportunity that would give for amendments to be proposed.

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89 *The Future of the Deregulation Procedure*, 20 April 1999, HC 324 1998-99

90 *The Deregulation Procedure: an Evaluation,* King's Hall Paper No 7, Hansard Society for Parliamentary Government, May 1999, para 1.2

91 *ibid*, para 4.2.2

92 6 Nov 1997, HL 32 1997-98

- **"Super-affirmative" statutory instruments**

In 1996 the House of Commons Procedure Committee published a report on delegated legislation and concluded that there were defects in the system for considering such legislation.[93] In March 2000 the Procedure Committee returned to this subject[94] and supported the recommendations in the earlier report, with minor modifications.[95] Both reports put forward proposals for a "sifting" mechanism and for a new category of "super-affirmative" orders (for complex statutory instruments), whereby proposals for draft orders would be laid before Parliament for pre-legislative scrutiny. The report of the Royal Commission on the Reform of the House of Lords (the Wakeham Commission), which included a chapter on scrutinising statutory instruments, also supported these proposals.[96]

- **Public bill procedure**

A more ambitious extension of the procedure has been discussed: in effect, to use it as a model for the scrutiny of primary legislation. A former Clerk in the House of Commons, Michael Ryle, has published an article on this possibility[97] and also gave evidence to Procedure Committee during its inquiry into delegated legislation.[98] Michael Ryle had also been a member of the Hansard Society Commission on the Legislative Process, which produced a far reaching report in 1993.[99] The Commission endorsed the importance of consultation in the legislative process, and welcomed the decision to appoint a Delegated Powers Scrutiny Committee in the Lords. Among its recommendations were proposals relating to the use and scrutiny of delegated legislation. The Commission considered that the balance between primary and secondary legislation could be shifted in favour of secondary legislation. More use could be made of "framework" or "skeleton" bills "provided that much more satisfactory procedures are adopted for parliamentary scrutiny of delegated legislation …".[100] Michael Ryle envisages a four-tier structure for statute law:[101]

> -as recommended by the Hansard Society Commission, the main principles of legislation and its central provisions should still be dealt with in primary

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93 *Delegated Legislation*, 5 June 1996, HC 152 1995-96

94 *Delegated Legislation*, 7 March 2000, HC 48 1999-2000

95 Further details of the Procedure Committee reports on delegated legislation are available from the Library in PCC Standard Note - *Delegated Legislation and the Procedure Committee Proposals*

96 *A House for the Future*, Jan 2000, Cm 4534, paras 7.22-7.26

97 "The Deregulation and Contracting Out Bill 1994: a blueprint for reform of the legislative procedure?", *Statute Law Review*, Vol 15 No 3, 1994, pp 170-81

98 HC 152 1995-96, 1-8

99 Hansard Society Commission on the Legislative process, *Making the Law*, 1993

100 *ibid*, para 267

101 "The Deregulation and Contracting Out Bill 1994: a blueprint for reform of the legislative procedure?", *Statute Law Review*, Vol 15 No 3, 1994, pp 179-80

> legislation, with bills being prepared, drafted, scrutinized in Parliament, and published as Acts, on the lines recommended by the Commission;
>
> -all the more important provisions for the implementation of Acts should be set out in major orders which should be prepared on the basis of consultations carried out on the same lines as for deregulation orders. These orders should also be subject to much the same procedures for parliamentary scrutiny and approval as have been agreed for deregulation orders, except that more than one Committee would clearly be needed and membership of the Committees would have to be made more subject-specialized, perhaps by the use of added members. As such orders would be subject to thorough examination and debate in both Houses, and formal parliamentary approval, it should be acceptable, on occasions (not too frequently), to include Henry VIII provisions;
>
> -other less important details would be dealt with by SIs subject to either the affirmative or the negative procedure, as now, except that they would all have to be scrutinized more carefully and systematically, as proposed by the Commission. These procedures should not be used for Henry VIII provisions; and
>
> -as now, very minor or purely administrative details could be dealt with by instruments not subject to any parliamentary procedure.
>
> There would be widespread advantages in adopting this structure. Bills would become shorter, simpler, and easier to take through Parliament. Ministers would have greater flexibility in updating and reforming earlier legislation by use of Orders. Both of these changes would be of advantage to the Government. The Opposition, on the other hand, would benefit by being able to debate bills which are primarily concerned with principles and policy and less cluttered with detail. The Opposition and backbenchers in both Houses would be able to scrutinize the details of legislation which affect their constituents much more thoroughly, and with more information, than under present procedures on SIs (and indeed more thoroughly than they often do when debating bills under the guillotine!). Affected and interested bodies outside Parliament would benefit from fuller and better conducted consultation and from being able to bring their anxieties about delegated legislation - especially on practical questions of application and enforcement - directly before Parliament. All those concerned would benefit from having more understandable Acts of Parliament.

The *Regulatory Reform Bill [HL]* does not incorporate any of the changes proposed above. However, they remain on the parliamentary reform agenda.

# VII Pre-legislative Scrutiny of Draft Bills

The *Regulatory Reform Bill [HL]* is a relatively short bill, but deals with powers which are significant and which raise important questions for Parliament. While the issue of the delegated powers contained in the Bill could be said to be controversial in parliamentary terms, this was not a politically controversial bill.[102] The deregulation procedure was introduced under a Conservative administration, and is being reformed under a Labour one. It is not a typical bill for other reasons: it covers subjects on which Parliament itself has special expertise, and, additionally, the pre-legislative scrutiny was undertaken by existing committees which, through their normal functions, are experienced in scrutinising legislation. It is an example of a draft bill which has been subject to an extensive amount of pre-legislative scrutiny and comment, (and is, for that reason, not typical of draft bills generally). However, it might useful to examine the Bill to see how it benefited from pre-legislative scrutiny.

## A. Background

In June 1997, shortly after the 1997 Parliament convened, a new committee was set up "to consider how the practices and procedures of the House should be modernised". The Select Committee on the Modernisation of the House of Commons was specifically charged, as a first priority, with improving the legislative process. Among the recommendations contained in its first report[103] the Committee put forward the view that more bills should be subject to pre-legislative scrutiny. While some bills had previously been published in draft form, the Committee recommended a more regular and systematic use of draft bills: [104]

> Pre-legislative scrutiny
> 91. We welcome the Government's intention to publish 7 draft bills in the course of this Session, and recommend that some, or even all, be considered by the House, using one of the easily available avenues-
> (i) an ad hoc Select Committee to consider a particular draft bill: or
> (ii) following a discussion with the House of Lords, an ad hoc Joint Select Committee to consider a particular draft bill: or
> (iii) consideration of a particular draft bill by the appropriate departmental select committee.

The Committee set out its belief in the benefits of pre-legislative scrutiny:

> 20. There is almost universal agreement that pre-legislative scrutiny is right in principle, subject to the circumstances and nature of the legislation. It provides an

[102] although there was some discussion as to the interpretation of the term "not politically controversial" in the Lords debates, eg, HL Deb 13 Feb 2001 Vol 622 c 186-7
[103] *The Legislative Process*, 23 July 1997, HC 190 1997-98
[104] *ibid*, Conclusions, para 91

> opportunity for the House as a whole, for individual backbenchers, and for the Opposition to have a real input into the form of the actual legislation which subsequently emerges, not least because Ministers are likely to be far more receptive to suggestions for change before the Bill is actually published. It opens Parliament up to those outside affected by legislation. At the same time such pre-legislative scrutiny can be of real benefit to the Government. It could, and indeed should, lead to less time being needed at later stages of the legislative process; the use of the Chair's powers of selection would naturally reflect the extent and nature of previous scrutiny and debate. Above all, it should lead to better legislation and less likelihood of subsequent amending legislation.

Appendix C lists the draft bills which have been published during each parliamentary session since 1997/98, together with details of the parliamentary scrutiny which has applied to each.

The Constitution Unit published a study by Greg Power of parliamentary pre-legislative scrutiny of draft bills 1997-1999, including case studies of four draft bills.[105] This report gave a general endorsement of the effectiveness and benefit of involving Parliament in pre-legislative scrutiny, but made several recommendations for reform, concentrating on three main themes:[106]

- the need for clarification of the purpose of pre-legislative scrutiny
- the problems of timing and resources
- confusion caused by lack of leadership and co-ordination in the pre-legislative scrutiny process

## B. Pre-legislative scrutiny of the *Regulatory Reform Bill [HL]*

The extensive pre-legislative scrutiny of the *Regulatory Reform Bill [HL]* certainly resulted in a great deal of well-informed and constructive dialogue on the issues involved in the Government's proposed extension of the deregulation procedure. As discussed above, the quality of the work of the two parliamentary deregulation committees is held in high regard, and the benefits to the process of having the experience and expertise of two dedicated select committees are obvious. The Lords Committee on Delegated Powers and Deregulation in its report on the *Regulatory Reform Bill [HL]* commented as follows on pre-legislative scrutiny of the Bill:[107]

> […] The Cabinet Office's handling of the pre-legislative scrutiny of this bill has been a model of this process. Throughout a period which has lasted for almost two years it has repeatedly consulted the two Deregulation Committees.

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105 Greg Power, *Parliamentary Scrutiny of Draft Legislation 1997-1999*, Aug 2000

106 *ibid*, pp 47-50

107 Select Committee on Delegated Powers and Deregulation (HL), *Regulatory Reform Bill [HL]*, 18 Dec 2000, HL 8 2000-01

> Additionally, because of our specific remit in considering delegated powers, the Cabinet Office has informed the Committee of each proposed change to the draft bill, and consulted the Committee on both an informal and formal basis. As a result, some of the provisions which the Government had intended to include in the bill have already been dropped, and numerous smaller changes have been taken on board. Had this not happened, we have no doubt that the present report would be not only longer but of a much more critical nature.

The pre-legislative stages of this Bill did not suffer from problems in the three areas outlined in Greg Power's study (see above) - clarity of purpose, timing and resources and lack of co-ordination and leadership in the process. This is probably due to the extensive and constructive consultation process and the willingness of the Government to withdraw and recast proposals, the expert and dedicated parliamentary committees, and the nature of the provisions of the Bill. These same issues no doubt contributed in large measure to the Bill's relatively easy passage in the House Lords: two days at committee stage and one day on report. The contributions to the debate were well-informed and of high quality. If the number of amendments is examined, there were very few: one at committee stage, 10 at report stage and one at third reading. Against the Modernisation Committee's perceived benefits - more opportunity for Parliament to have an input into legislation, less time needed during the parliamentary stages, and, ultimately, better legislation - the Bill also fares well.

However, while this Bill is undoubtedly a prime example of successful pre-legislative scrutiny, it is naïve to suggest that it could act as a model for every piece of legislation. Such a long period of pre-legislative consultation (one year 9 months) would not be practical in terms of the government's legislative programme, and the increase in parliamentary resources required would be substantial. The exceptionally wide and controversial power provided for in the *Regulatory Reform Bill [HL]*, with all the attendant constitutional considerations, merited such meticulous treatment. Parliament will want to keep under review the procedures developed to deal with the extension to this form of delegated power.

# Appendix A – List of Relevant Documents

**A chronological list of relevant reports and papers:**[108]

Select Committee on Procedure (HL), *The Committee Work of the House*, 10 Feb 1992, HL 35 1991-92

Select Committee on Procedure, *Parliamentary Scrutiny of Deregulation Orders*, 30 Mar 1994, HC 238 1993-94

Delegated Powers Select Committee (HL), *Review of the Committee's Work 1993-94*, 18 Oct 1994, HL 90 1993-94

Select Committee on Procedure, *Parliamentary Scrutiny of Deregulation Orders: Government response to the fourth report*, 11 May 1994, HC 404 1993-94

Delegated Powers Select Committee (HL), *Special Report on Deregulation Orders*, 6 Apr 1995, HL 48 1994-95

*Deregulation and Contracting Out Act 1994*, Chap 40 1994, Nov 1994

*Proposed Amendments to the Deregulation and Contracting Out Act 1994: a consultation document,* Cabinet Office, March 1999

Select Committee on Deregulation, *The Future of the Deregulation Procedure*, 20 April 1999, HC 324 1998-99

Select Committee on Delegated Powers and Deregulation (HL), *Proposed Extension of the Deregulation and Contracting Out Act 1994*, 21 April 1999, HL 55 1998-99

*Proposed Extension of the Deregulation and Contracting Out Act 1994: summary of responses to the Government's consultation exercise and proposed next steps*, Cabinet Office, Sept 1999

*Proposals to improve the quality of enforcement services – A consultative document on Section 5 of the Deregulation and Contracting Out Act 1994*, Cabinet Office, Sept 1999

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[108] The Cabinet Office has an excellent web site on the Regulatory Reform Bill, which includes links to most of these background documents - http://www.cabinet-office.gov.uk/regulation/bill/index.htm

Select Committee on Delegated Powers and Deregulation (HL), *Proposed Amendments to the Deregulation and Contracting Out Act 1994: Government Response and Further Report*, 27 Oct 1999, HL 111 1998-99

Select Committee on Deregulation, *Government Response to the Deregulation Committee's First Special Report, session 1998-99, on the Future of the Deregulation Procedure*, 24 Jan 2000, HC 177 1999-2000

*Government's Response to the Consultation Exercise on Proposed Amendments to Section 5 of the Deregulation and Contracting Out Act*, Cabinet Office, April 2000

*Publication of the Draft Regulatory Reform Bill*, Cm 4713, April 2000

Select Committee on Delegated Powers and Deregulation (HL), *Draft Regulatory Reform Bill*, 8 May 2000, HL 61 1999-2000

Select Committee on Deregulation, *Pre-legislative Scrutiny of the Draft Regulatory Reform Bill*, 16 May 2000, HC 488 1999-2000

Select Committee on Delegated Powers and Deregulation (HL), *Draft Regulatory Reform Bill: further report*, 5 July 2000, HL 86 1999-2000

Select Committee on Deregulation, *Further Report on the Draft Regulatory Reform Bill*, 11 July 2000, HC 705 1999-2000

Select Committee on Delegated Powers and Deregulation (HL), *Special Report for 1999-2000: the Committee's work*, 29 Nov 2000, HL 130 1999-2000

*Regulatory Reform Bill [HL]*, 7 Dec 2000, HL Bill 2 2000-01 and Explanatory Notes

*Memorandum by the Cabinet Office to the House of Lords' Delegated Powers and Deregulation Committee on the Regulatory Reform Bill*, Cabinet Office, Dec 2000

*Regulatory Impact Assessment for the Regulatory Reform Bill*, Cabinet Office, Dec 2000

Select Committee on Delegated Powers and Deregulation (HL), *Regulatory Reform Bill [HL]*, 18 Dec 2000, HL 8 2000-01

*Regulatory Reform Bill [HL]* as amended in Committee (HL), 25 Jan 2001, HL Bill 13 2000-01

*Regulatory Reform Bill [HL]* as amended on Report (HL), 13 Feb 2001, HL Bill 24 2000-01

Select Committee on Delegated Powers and Deregulation (HL), *Regulatory Reform Bill [HL]: further report on the Bill's passage through the House of Lords*, 21 Feb 2001, HL 38 2000-01

*Regulatory Reform Bill [HL]* brought from the Lords, 26 Feb 2001, Bill 51 2000-01

Select Committee on Deregulation, *The Handling of Regulatory Reform Orders*, 13 Mar 2001, HC 328 2000-01

**Commentary:**

Michael Ryle, "The Deregulation and Contracting Out Bill 1994: a blueprint for reform of the legislative procedure?", *Statute Law Review*, Vol 15 No 3, 1994, pp 170-81

C M G Himsworth, "The Delegated Powers Scrutiny Committee", *Public Law*, Spring 1995, pp 52-6

T St J N Bates, "The Future of Parliamentary Scrutiny of Delegated Legislation: some judicial perspectives", *Statute Law Review*, Vol 19 (3), 1998, pp 155-76

David Miers, *The Deregulation Procedure: an evaluation*, King's Hall Paper No 7, Hansard Society for Parliamentary Government, May 1999

David Miers, "The Deregulation Procedure: an expanding role", *Public Law*, Autumn 1999, pp 477-503

Philippa Tudor, "Secondary Legislation: second class or crucial", *Statute Law Review*, Vol 21 (3), 2000, pp 149-62

# Appendix B – Potential Regulatory Reform Orders

On 27 November 2000, in a written answer to a PQ asked by Mr Gareth R Thomas on what proposals the Government plan to bring forward under the *Regulatory Reform Bill [HL]*, Mr Stringer list a number of proposals under preparation that could be implemented.[109] Reproduced below is an updated list as it appears in the *Explanatory Notes* to the *Regulatory Reform Bill* (Bill 51-EN).

**LIST OF POTENTIAL REGULATORY REFORM ORDERS**

A number of potential reforms could be brought forward under the order-making power in the Regulatory Reform Bill. The following proposals might be capable of delivery under the bill. Full details of the proposals have yet to be developed and the government cannot at this stage commit to delivering them by way of regulatory reform order.

1. Building Regulations (DETR)
2. Business tenancies (DETR)
3. Disposal of land at less than best price (DETR)
4. Grants and loans for the renewal of private sector housing (DETR)
5. Housing Transfers (DETR)
6. Landlord and Tenant Act s57 (DETR)
7. Orders removing exemptions from caravan site licensing (DETR)
8. Tree Preservation Order System (DETR)
9. After-hours childcare at schools (DfEE)
10. Approving a LEA's curriculum complaints procedures (DfEE)
11. Voluntary aided schools capital funding arrangements (DfEE)
12. Annual Statements under Chronically Sick and Disabled Persons Act 1970 (DoH)
13. Dental services — provision by corporate bodies (DoH)
14. Medicine Licences (DoH)
15. NHS Accounting for charitable funds (DoH)
16. Public Health Legislation — communicable disease (DoH)
17. Invalid Care Allowance (DSS)
18. Vaccine Damage Payments Scheme (DSS)
19. Abolition of 20 partner limit (DTI)
20. Reform of Unsolicited Goods and Service Act (DTI)
21. Repeal of Trading Stamps Act (DTI)
22. Unfair contract terms (DTI)
23. Weights & measures (DTI)
24. DVLA links with Benefit Agency (DVLA)
25. DVLA/Passport Agency Data Links (DVLA)
26. Vehicle Crime Reduction — Mandatory Mileage Recording (DVLA)

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[109] HC Deb 27 Nov 2000 Vol 357 c 369-370W

27. Vehicle Crime Reduction - Seriously Damaged Vehicle Information Hot Line (DVLA)
28. Fire safety (Home Office)
29. Gaming Machines (Home Office)
30. New Year's Eve deregulation (Home Office)
31. Reform of Gambling — Bingo (Home Office)
32. Rehabilitation of offenders — cautions, reprimands and final warnings (Home Office)
33. Restaurant licensing hours (Home Office)
34. Sexual Offences and access to victim material (Home Office)
35. Street Trading (Home Office)
36. Reform of charity law (Home Office/Charity Commission)
37. Bootleggers — Disclosure of names (HM Customs and Excise)
38. National Insurance Contributions — Third party awards to employees (HM Inland Revenue)
39. Attachment of Earnings (LCD)
40. Legal Services Ombudsman — personal signature (LCD)
41. Solicitors Act 1974 (LCD)
42. Vexatious Litigants (LCD)
43. Disclosure of information by MAFF to HSE (MAFF)
44. Home Grown Cereals Authority: Approval by Ministers of pensions and gratuities and arrangements for maintaining pension schemes (MAFF)
45. Home Grown Cereals Authority: Approval by the Treasury of remuneration for advisory committee members (MAFF)
46. Home Grown Cereals Authority: Corn Returns (MAFF)
47. Meat and Livestock Commission — extension of powers (MAFF)
48. Births and Deaths — errors on certificates (ONS/HMT)
49. Births and Deaths — Wales (ONS)
50. Reform of Civil Registration Service (ONS)
51. Copyright and Patents (Patent Office)

# Appendix C - Draft Bills Since 1997

## A Draft bills published by session

**Draft Bills published 1997-98**

- Pension Sharing on Divorce
  (subsequently incorporated into *the Welfare Reform and Pensions Bill 1998-99*)
- Criminal Justice (Terrorism and Conspiracy Bill)
  (subsequently the *Terrorism Bill 1999-2000*)

**Draft Bills published 1998-99**

- Limited Liability Partnership
  (subsequently the *Limited Liability Partnerships Bill [HL] 1999-2000*)
- Financial Services and Markets
  (subsequently the *Financial Services and Markets Bill 1998-99*)
- Food Standards
  (subsequently the *Food Standards Bill 1998-99*)
- Local Government (Organisation and Standards)
  (subsequently incorporated into the *Local Government Bill 1999-2000*)
- Freedom of Information
  (subsequently the *Freedom of Information Bill 1999-2000*)
- Electronic Communications
  (subsequently the *Electronic Communications Bill 1999-2000*)
- Political Parties, Elections and Referendums
  (subsequently the *Political Parties, Elections and Referendums Bill 1999-2000*)

**Draft Bills published 1999-2000**

- Insolvency Bill
  (subsequently the *Insolvency Bill [HL] 1999-2000*)
- Regulatory Reform
  (subsequently the *Regulatory Reform Bill [HL] 2000-01*)
- Football (Disorder)
  (subsequently the *Football (Disorder) Bill 1999-2000*)
- Commonhold and Leasehold Reform
  (subsequently the *Commonhold and Leasehold Reform Bill [HL] 2000-01*)
- International Criminal Court
  (subsequently the *International Criminal Court Bill [HL] 2000-01*)
- Water

**Draft Bills published 2000-2001**

- Proceeds of Crime

The Queen's Speech for the 2000-2001 session[110] indicated that the Government intended to publish two other draft bills to:

- improve the transparency of export controls and establish their purpose
- implement the recommendations of the review of the Criminal Justice System in Northern Ireland

## B Pre-legislative scrutiny of draft bills

Of the fifteen draft bills presented so far in the 1997 Parliament, ten have been subject to pre-legislative parliamentary scrutiny. The use of the mechanisms outlined in the Modernisation Committee's first report is as follows:

**Ad hoc select committee**

| | |
|---|---|
| Used twice - | Food Standards Committee |
| | Freedom of Information Committee (HL) |

**Ad hoc joint select committee**

| | |
|---|---|
| Used twice - | Financial Services and Markets Joint Committee |
| | Local Government (Organisation and Standards) Joint Committee |

**Departmental select committee**

| | |
|---|---|
| Used six times - | Pension Sharing on Divorce (Social Security Committee ) |
| | Electronic Communications (Trade and Industry Select Committee) |
| | Limited Liability Partnerships (Trade and Industry Select Committee) |
| | Freedom of Information (Public Administration Committee) |
| | Insolvency (Trade and Industry Select Committee) |
| | Water (Environment, Transport & the Regions Select Committee) |

**Other select committees**

| | |
|---|---|
| Used once - | *Regulatory Reform Bill* (Deregulation Select Committee and Delegated Powers and Deregulation Select Committee (HL)) |

Note: the *Freedom of Information Draft Bill* was examined by both a House of Lords ad hoc select committee and a departmental select committee.

110 HC Deb 6 Dec 2000 Vol 359 c 3-5