Legislative and Regulatory Reform Bill – the Bill's progress and further reaction to the Bill

Standard Note: SN/PC/3998
Last updated: 3 November 2006
Author: Richard Kelly
Parliament and Constitution Centre

Before the *Legislative and Regulatory Reform Bill* was published, it was widely expected to update the regulatory reform procedures contained in the *Regulatory Reform Act 2000*. However, when the Bill was published some concern about the extent of the powers to make orders in connection with any legislation was expressed in Parliament. Those concerns grew as the Bill made its way through the House of Commons.

The Bill received an unopposed second reading in the House of Commons on 9 February 2006 and completed its committee stage on 9 March 2006. The Bill was amended in committee. It was further amended on Report (15 and 16 May 2006), as the Government tabled amendments to take account of the concerns about the breadth of the order-making powers in the original Bill.

The Bill passed its Third Reading in the House of Commons on 16 May 2006, and was introduced in the House of Lords on 17 May. It was the subject of inquiries by two Committees in the House of Lords – the Delegated Powers and Regulatory Reform and the Constitution Committees – before its second reading on 13 June 2006.

The House of Lords considered the Bill in committee over three days (3, 10 and 19 July 2006). The Bill was amended by the Committee. It was further amended on report in the House of Lords on 26 October 2006. It received its third reading on 2 November 2006.

The House of Commons is expected to consider Lords Amendments on 7 November 2006.

This note briefly reviews the changes made to the Bill in the Commons and, so far, in the Lords, and the background to those changes.

Notes of some comments that were made on the Bill since its publication were included in previous versions of this note.

Contents

A. Progress of the Bill

The *Legislative and Regulatory Reform Bill* (Bill 111 of 2005-06) was introduced into the House of Commons on 11 January 2006.[1]

It received an unopposed second reading on 9 February 2006.[2]

The Standing Committee to consider the Bill was appointed on 15 February 2006,[3] and the programme motion required its deliberation to be brought to a conclusion on 9 March 2006.[4]

The Standing Committee met on eight occasions and made a number of amendments to the Bill, which was republished (Bill 141 of 2005-06) on 10 March 2006.

The remaining stages of the Bill were taken over two days on 15 and 16 May 2006.[5]

The Bill was introduced into the House of Lords on 17 May 2006 (HL Bill 109 of 2005-06). It received its second reading on 13 June 2006,[6] and completed its Committee stage over three days (3, 10 and 19 July 2006).[7] The Bill was amended by the Committee.

The Bill (HL Bill 146 of 2005-06) was considered on report in the House of Lords on 26 October 2006. It was further amended.

HL Bill 161, the amended version, received its third reading on 2 November.

The House of Commons is expected to consider Lords amendments on 7 November 2006.

B. Summary of main changes to the Bill

a. Standing Committee: House of Commons

"Technical" amendments that made it easier to make statutory instruments under more than one enabling power were agreed to.

b. Report Stage: House of Commons

The single order-making provision in the Bill that was originally introduced into the Commons was replaced by three distinct order-making powers – the "power to remove or reduce burdens", the "power to promote regulatory principles", and the "power to implement Law Commission recommendations".

A new definition of 'burden' was included.

---

1 HC Deb 11 January 2006 c305
2 HC Deb 9 February 2006 cc1048-1103
3 HC Votes and Proceedings 15 February 2006 677
4 HC Deb 9 February 2006 c1103
5 HC Deb 15 May 2006 cc693-801 and HC Deb 16 May cc871-969
6 HL Deb 13 June 2006 cc120-190
7 HL Deb 3 July 2006 cc12-70 and 96-120; 10 July 2006 cc483-511 and cc565-580; 19 July 2006 cc1331-1404

A new clause prevented orders made under this provision from being used to amend or repeal any provision of the Act itself or the *Human Rights Act 1998*.

The 21-day period for either House to request a more stringent procedure for considering an order was extended to 30 days.

A veto power to recommend that no further proceedings be taken in relation to a draft order was introduced, irrespective of nature of the parliamentary proceedings on the order. This power would be available to committees considering the draft orders. However, the recommendation could be rejected by resolution of the House whose Committee made it.

c. Committee Stage: House of Lords

Further changes were made to the provisions on powers: the power to implement Law Commission recommendations by order was removed from the Bill.

The provisions on the veto were further amended.

d. Report Stage: House of Lords

A further pre-condition, that the provision is not of constitutional significance, was added to the list of conditions that would prevent the order-making power from being used.

The order-making power cannot be used to impose, abolish or vary any tax as a result of an amendment made on report.

Provisions to implement Law Commission recommendations were not reintroduced.

C. Parliamentary concerns before second reading

The Regulatory Reform Committee of the House of Commons and the Constitution Committee of the House of Lords both commented on the *Legislative and Regulatory Reform Bill* [Bill 111 of 2005-06] between its publication and second reading.

Both the Regulatory Reform Committee and the Constitution Committee commented that the wide ranging powers to use orders to make changes to primary legislation were of concern. In addition, the Procedure Committee took evidence from the Minister before the Bill's second reading and a number of Members made representations about the committee stage being taken on the floor of the House.

1. Regulatory Reform Committee

The Regulatory Reform Committee said that the Bill had "the potential to be the most constitutionally significant Bill that has been brought before Parliament for some years. It needs to be scrutinised with particular care".[8]

---

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

On 1 March 2006, Jim Murphy placed an initial response to the Regulatory Reform Committee's report on the Bill (dated 24 February 2006) in the Library of the House.[9] The Minister thanked the Committee for "its on-going scrutiny and the support they have expressed for the overall objectives of the Bill". In an annex to his letter, the Cabinet Office addressed the Committee's recommendations.

The Committee had called for prohibitions from reforming specified areas by order, to allow Parliament to veto an order and to prevent the Government from reintroducing an order to address a policy that had been vetoed for two years. In its response, the Government acknowledged "the concerns expressed by the Committee and others regarding the breadth of the powers contained in Part 1 of the Bill" but argued that the Bill "provides a flexible power to effectively deliver better regulation". It repeated the safeguards in the Bill and then commented:

> Additionally, we have re-iterated two commitments – that highly controversial proposals are not appropriate for delivery by order, and that the Government will not force an order through in the face of opposition from the Parliamentary scrutiny Committees, effectively giving the Committee a veto over individual orders.

The Committee had recommended that either it should have longer to consider under which procedure an order should be considered by Parliament; or that no order should undergo the negative procedure and that it should have longer to determine what type of scrutiny the order should be subjected to; or that orders should undergo the super-affirmative procedure by default. The Government welcomed the Committee's "recognition of the rationale behind our proposals on procedures" and said that it would consider the Committee's proposals carefully.

2. House of Lords Constitution Committee

On 23 January 2006, Lord Holme of Cheltenham, the chairman of the House of Lords Constitution Committee, wrote to Lord Falconer, the Lord Chancellor and Secretary of State for Constitutional Affairs, outlining his Committee's initial concerns about the Bill: it considered the powers in the Bill to be "unprecedently wide".[10]

The Lord Chancellor replied to this letter on 7 February 2006. He acknowledged that "the power to make orders in the Bill is wide ranging". However, he argued that "the Government has been mindful at all times of the need to balance the objectives of the Bill with the need for sensitivity in managing the relationship between the executive and the legislature". He then set out "some of the thinking behind the Bill".[11]

---

9 MGP 06/579

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

11 Constitution Committee, *Letter from the Lord Chancellor and Secretary of State for Constitutional Affairs to the Chairman of the Committee*, 7 February 2006, http://www.parliament.uk/documents/upload/Letter%20from%20Lord%20Chancellor%2007.02%2E06%20%28word%29%2Edoc

3. Procedure Committee

The Procedure Committee in the Commons took evidence from Jim Murphy, the Cabinet Office minister, on the Bill before it received its second reading. It also raised the constitutional concerns. Katy Clark asked:

> The Government is presenting this Bill as a successor to the Regulatory Reform Act. How do you respond to the argument that, rather than a logical improvement to the previous regime, this Bill raises fundamental constitutional questions about how Parliament should consider primary legislation?[12]

The Procedure Committee's report, *Legislative and Regulatory Reform Bill*, was published on 17 March 2006.[13] In its summary, the Committee commented:

> The procedural implications of the Bill are directly influenced by its scope. The House will expect significantly greater and more elaborate procedural safeguards over the use of a new power whose scope represents a fundamental change in the way Parliament deals with legislation than over the use of a power which is no more than an incremental development of an existing and well-established procedure.
>
> We agree with the Regulatory Reform Committee that, as drafted, the Bill is of major constitutional significance. It is a long-standing, and widely supported, convention that such Bills are taken in Committee of the Whole House and we regret that the Government did not follow that precedent in this case.
>
> The Bill sets out the parliamentary procedures for the consideration of draft orders in some detail. We are not persuaded that this is the correct approach. We have recommended instead that as far as possible the parliamentary procedures should be contained in Standing Orders.
>
> The Bill provides that Parliament (through the relevant committee in each House) is required to decide within 21 days for each proposed order whether the Minister has recommended the correct level of parliamentary scrutiny. This is an unnecessarily demanding timetable and we recommend that it should be extended.
>
> Although the Government has given an undertaking that it would not proceed with an order if the relevant committees determined that it was an inappropriate use of the power (if for example the policy content was highly controversial), there is no provision in the bill allowing the House to veto further proceedings on a draft order. We recommend that there should be.

4. Committee stage scrutiny

The Programme motion governing how the Bill would be considered specified that "The Bill shall be committed to a Standing Committee".[14] During Business Questions on the day of the second reading debate, Geoff Hoon was asked whether, given the constitutional

---

12 Procedure Committee, *Legislative and Regulatory Reform Bill – uncorrected evidence (7 February 2006)*, 9 February 2006, HC 894-i 2005-06, Q6

13 Procedure Committee, *Legislative and Regulatory Reform Bill*, 17 March 2006, HC 894 2005-06

signficance of the Bill, it should be considered by a Committee of the whole House. He told the House that he was "still considering the matter".[15]

Despite Mr Hoon's response, the Programme motion was put to the House later the same day and agreed, following a division, by 233 votes to 100.[16]

A week later, again at Business Questions, Geoff Hoon was asked whether he would take steps to allow the House to rescind its decision to refer the Bill to a standing committee:

> **David Howarth (Cambridge) (LD):** I hope that the Leader of the House has had a chance to read a letter in *The Times* today from six professors of law at Cambridge university, expressing their concern about the extraordinary powers granted to the Government by the Legislative and Regulatory Reform Bill, which is now widely known as the "Abolition of Parliament Bill". Will he take steps to rescind the decision of the House last Thursday not to consider the Bill in a Committee of the whole House but to take it upstairs? Surely, given the Bill's massive constitutional importance and the seriousness of what part 1 does to the House's powers, all Members should have the opportunity to discuss it in detail on the Floor of the House.
>
> **Mr. Hoon:** I know that the hon. Gentleman is on temporary, sabbatical leave from the university of Cambridge. We are delighted to have him here for a relatively short time while he represents the people of Cambridge. I hope that he did not stimulate that letter in *The Times* from his former colleagues in the law faculty at Cambridge university. I know that he is a distinguished lawyer and anxious to get back to academic life as soon as possible, but before he does so he will of course have the opportunity to debate the Bill in Committee in detail, and we look forward to his observations.[17]

Library Research Paper on the Bill

Some of these parliamentary concerns were discussed in the Library Research Paper on the Bill, which was published before the Bill's second reading.[18] However, other concerns were voiced during and after the second reading debate. This standard note brings together some of the reaction to the Bill that emerged after the Research Paper was published.

It considers comments that were made in Parliament before the second reading took place, and during the second reading. It also reviews some of the comment that followed the second reading that appeared in the press.

D. Proceedings in the Commons

1. Second reading debate

The House of Commons gave the *Legislative and Regulatory Reform Bill* an unopposed second reading on 9 February 2006.[19]

---

14 HC Deb 9 February 2006 c1103
15 HC Deb 9 February 2006 c1013
16 HC Deb 9 February 2006 cc1103-1105
17 HC Deb 16 February 2006 cc1567-1568
18 House of Commons Library, *The Legislative and Regulatory Reform Bill – Bill 111 of 2005-06*, RP 06/06, 6 February 2006
19 HC Deb 9 February 2006 cc1048-1103

During the course of the debate, there was broad support for the call to reduce regulatory burdens,[20] which Jim Murphy said was central to the Bill:

> The central issue is to find the most appropriate and effective means of implementing the proposals. The current arrangements are not fit for purpose. Without the Bill, many of the proposals on which Departments are working will remain just that—proposals. Time on the Floor of the House is rightly precious, and should be reserved for the big issues of the day. Legislative changes to bring about better regulation outcomes, however, are often minor and technical in nature. Not surprisingly, Departments, which must compete for limited space in the legislative programme, find it difficult to justify Bills for such measures. When better regulation reforms are forced to compete for precious parliamentary time, this and future Governments will struggle, just as previous Governments have, to ease the burden on business and our public services.[21]

However, there was widespread concern about the approach that neither stipulated that burdens had to be removed,[22] nor limited the Government's power to amend any legislation.[23] Jim Murphy acknolwdged these concerns:

> I acknowledge that the proposed regulatory reform power in this Bill will make important changes to the way in which we pass some legislation. It is important to remember, however, that Parliament accepted the need for an alternative legislative route when it passed the 2001 Act. The order-making power in this Bill simply aims to put right the inadequacies of the 2001 Act. The Bill will not undermine the legislative rights of the House or its role in scrutinising Government proposals; on the contrary, the Government would like to see the House playing a much fuller role in pursuing the better regulation agenda and scrutinising more Government proposals to improve our regulatory landscape.[24]

However, he considered that the review of the *Regulatory Reform Act 2001* had found a number of flaws in the existing approach to regulatory reform. These flaws were the concept of burdens, limits preventing orders being used to change legislation that was less than two years old, and the disproportionate amount of work involved in preparing orders.

Oliver Heald, the Conservative Shadow Chancellor of the Duchy of Lancaster, expressed a number of concerns, including:

> The Minister has said that we will continue to have full parliamentary debate for terrorism measures and the Parliament Acts, but he must accept that they are of the highest importance among the measures that we expect to debate on the Floor. The House would wish to debate many matters that were controversial, but not in that highest category. I will want the Minister's assurances to be included in the Bill so that they bind his successors.[25]

---

[20] e.g. HC Deb 9 February 2006 c1069; c1090
[21] HC Deb 9 February 2006 c1052
[22] HC Deb 9 February 2006 c1078
[23] HC Deb 9 February 2006 c1076
[24] HC Deb 9 February 2006 c1052
[25] HC Deb 9 February 2006 c1065

Jim Murphy concluded that "The review left the Government in no doubt that the RRO power needed to be reformed".[26] He also argued that the Government would not misuse the powers. First, there were conditions on how the order making powers could be used: "the preconditions in the Bill are stronger than those in the 2001 Act. They have a wider application, applying to all types of provision made by order, not just to those affecting burdens".[27] Secondly, he gave the following undertaking in relation to the types of reforms that would be undertaken under the powers:

> I am giving a clear undertaking today that orders will not be used to implement highly controversial reforms, that they will not be forced through in the face of opposition from the Committees of this House and that the Committees' views on what is appropriate for delivery by order will be final. Under the super-affirmative procedure, which, as I have said, Parliament has a right to require, these Committees will be able to recommend amendments to orders, and the Minister will be able to lay a revised draft order reflecting those recommendations. The safeguards contained in the 2001 Act have been maintained or enhanced. Key procedural safeguards have been retained and I have given clear undertakings on the appropriate use of these powers.[28]

The House also debated the way in which it would scrutinise the orders made under the powers in the Bill. Alison Seabeck told the House:

> Although the Committee and I wholeheartedly support most of the proposals in the Bill, there is a need to put in place additional safeguards. We need a shift back towards paying heed to the views of Parliament. The way forward would be to identify in the Bill legislation that would be off limits for the new fast-track process. We need several no-go areas beyond those that the Minister described as being of the highest importance. It should be possible to put in place a veto so that during the preliminary period of procedural consideration, it would be possible for either House of Parliament by resolution, or the appropriate Committee in either House that was charged with reporting on the order by recommendation, not only to vary the Minister's recommendation for procedure on a given draft order, but to determine that the part 1 procedure should not apply at all. If such a determination were made, no further draft order to the same effect, albeit perhaps tweaked a little, should be laid within two years of the determination date. If we were to adopt such a procedure, we would need to examine the role and powers of the responsible Committee following a consideration of the Standing Orders. Has the Minister had any discussions with the Leader of the House about the implications of such a change?[29]

David Howarth pointed out that under all but the super-affirmative procedure, there are no means to amend the orders.[30]

---

[26] HC Deb 9 February 2006 c1053
[27] HC Deb 9 February 2006 c1055
[28] HC Deb 9 February 2006 cc1058-9
[29] HC Deb 9 February 2006 c1083
[30] HC Deb 9 February 2006 c1095

2. Standing committee debate

Standing Committee A considered the Bill over eight sessions between 28 February and 9 March 2006. The Committee accepted very few amendments to the Bill. A number of Opposition-initiated amendments that reflected concerns about the Bill that were discussed on second reading were rejected by the Committee.

There was a considerable debate on whether clause 1 should stand part of the Bill.[31] The Committee also divided on whether it should be possible to use the negative resolution procedure to scrutinise orders in Parliament: it agreed that it should be possible to use such procedures.[32]

a. Amendments made

The five amendments to clause 27 that were accepted, without a vote, by the Committee were described as "drafting amendments that are aimed at improving a technical clause to make it more precise".[33] (Clause 27 of Bill 111 became clause 28 of Bill 141.)

Two new clauses were also added to the Bill, again the Minister described them as "technical":

> Currently, it is not possible for a statutory instrument made under an enabling power in one Act to be combined with a statutory instrument made under an enabling power in another Act if parliamentary procedures require that the two Acts differ. However, it is possible for statutory instruments of same type, for example when both are orders or regulations, that are made under different enabling powers and go through the same parliamentary procedure, to be combined into one instrument.
>
> New clause 17 would enable provisions under section 2(2) of the European Communities Act 1972 and those under another Act to be contained in a single instrument when the provision under the Act is subject to a different procedure. Broadly put, the instrument as a whole will have to follow whichever procedure under either Act is the more onerous. Section 2(2) of the European Communities Act enables the use of either affirmative or negative resolution procedure when the appropriate procedure for an instrument made under the section was affirmative. The instrument could also include provision made under another power.
>
> New clause 18 will similarly make it possible to combine statutory instruments made under section 2(2) of the European Communities Act with an order made under clause 1, provided that the order as a whole is subject to the procedure required under part 1 of the Bill. That will enable a single order to implement Community law—section 2(2) of the ECA—while also using clause 1 to remove pre-existing domestic statutory regulatory requirements that are no longer thought appropriate, as a result.
>
> I reassure hon. Members that the purpose of new clause 17 is not to enable Ministers to make provisions and subordinate instruments that they could not already have made, but to reduce the number of instruments needed to make provisions that could

---

31 SC Deb (A) 2 March 2006 cc77-107
32 SC Deb (A) 7 March 2006 cc228-229
33 SC Deb (A) 9 March 2006 c281

already be made. I hope that I have been helpful in a technical sense. The amendment is minor. As I have illustrated, it is about simplification.[34]

New clause 17 became clause 29 of Bill 141 and new clause 18 became clause 18 of Bill 141.

b. Amendments rejected

- an amendment that would have reinserted conditions that the powers had to be used to remove burdens was rejected (Amendment 20);[35]

- an amendment that would have prevented amended Law Commission reports being implemented under these powers was rejected;[36]

- an amendment that would have prevented the powers being used to amend Local Acts was rejected;[37]

- amendments on clause 2 were rejected: Christopher Chope, in moving the amendments, said that they tried "to deal with and control the extensive powers that the Government are taking in this legislation and to rein back that scope so that we are left with the purely essential";[38]

- amendment 36 according to its proposer, Christopher Chope, introduced an objective, rather than subjective, test into the question of whether an order was required: it was rejected;[39]

- amendments to limit the powers to alter the levels of penalties in relation to various offences and in relation to the powers of forcible entry were rejected;[40]

- an amendment that would have specified how the Government should respond to amendments made to orders considered under the super-affirmative procedure was rejected;[41]

- an amendment that would have limited the scope of changes in the common law to those since a Law Commission recommendation was rejected.[42]

In the light of the debate on the Bill, a number of new clauses were divided on at the end of the committee stage. The Committee rejected new clauses 2 and 7 ("Reserved Areas of Competence" and "Excepted Acts", respectively), which would have prevented order making

---

34 SC Deb (A) 9 March 2006 cc294-295
35 SC Deb (A) 28 February 2006 cc12-50
36 SC Deb (A) 28 February 2006 c50
37 SC Deb (A) 28 February 2006 cc50-74
38 SC Deb (A) 2 March 2006 cc107-133
39 SC Deb (A) 2 March 2006 cc133-150
40 SC Deb (A) 7 March 2006 cc163-178
41 SC Deb (A) 7 March 2006 cc229-233
42 SC Deb (A) 7 March 2006 c238

powers being used in connection with certain statute law.[43] It rejected new clause 6 – a "sunset clause" – that would have meant that the Bill ceased to have effect five years after it came into force.[44] The Committee also rejected a new clause relating to judicial tenure.[45]

The amended Bill, Bill 141 of 2005-06 was published on 10 March 2006.

c. Public Administration Select Committee: concerns

On 25 April 2006, the Public Administration Select Committee published a short report on the Bill.[46] It expressed its concern that the Government had not taken sufficient notice of the constitutional concerns surrounding the Bill. It supported the principle of "delivering better regulation reforms to legislation" but wanted to see the Bill amended in a number of ways to prevent misuse of the order making powers it contained.

3. Remaining stages

The remaining stages (Report Stage and Third Reading) were taken on 15 and 16 May 2006. The programme motion (of 9 February 2006) was varied to allow this.[47]

In the Government reshuffle, on 5 May 2006, Hilary Armstrong was appointed as Secretary of State for the Cabinet Office and Pat McFadden Ed Miliband were appointed Parliamentary Secretaries.

a. Government amendments

In a letter to the Regulatory Reform Committee, Jim Murphy announced that he would be bringing forward amendments to the Bill to reflect concerns that had been expressed both inside and outside Parliament:

> However in its current form, the Bill has caused some people to voice concern about the order making power of the Bill. Some of the wilder concerns have ranged from government being able to use the power to abolish trial by jury to repealing the Magna Carta. These and other far-fetched concerns about our constitutional arrangements could never happen as a result of this Bill. Similar wild accusations were made in 1994 and 2001 and proved to be groundless.
>
> However, I have listened to more measured concerns about using the power for changes to legislation that deliver no better regulation benefit. Again I must stress that this Bill is to deliver our better regulation agenda and nothing else.
>
> I am writing to you today to confirm my intention to move this debate on to the real agenda of better regulation and to remove any cause for concern that the Legislative

---

43 SC Deb (A) 9 March 2006 cc296-297
44 SC Deb (A) 9 March 2006 c297
45 SC Deb (A) 9 March 2006 c298
46 Public Administration Select Committee, *Legislative and Regulatory Reform Bill*, 25 April 2006, HC 1033 2005-06
47 HC Deb 15 May 2006 c708

> and Regulatory Reform Bill could ever be used for anything other than achieving our better regulation objectives.[48]

The amendments that Jim Murphy foreshadowed were tabled on 3 May 2006, and included new clauses to replace the order making power provisions in clauses 1 and 2 of the Bill that was reported by the Standing Committee. The amendments also included provisions relating specifically to Law Commission proposals.[49]

b. Report Stage

The majority of the two days allowed for Report Stage and Third Reading were devoted to the Bill's Report Stage. In opening the debate at Report Stage, Pat McFadden said that:

> … we are debating a series of important amendments to the Bill, which are in large part the Government's response to some of the criticisms raised and fears expressed about the Bill.[50]

The major changes made to the Bill at Report Stage are summarised below.[51]

Order-making powers

The single order-making provision in the Bill that was originally introduced into the Commons (clause 1 of Bill 111) is now replaced by three distinct order-making powers – the "power to remove or reduce burdens", the "power to promote regulatory principles", and the "power to implement Law Commission recommendations" (new clauses 19, 20 and 21 during the debate and now clauses 1, 2 and 3 of HL Bill 109).

Pat McFadden introduced two of the new clauses (19 and 20), and Bridget Prentice, the Parliamentary Secretary at the Department for Constitutional Affairs, introduced the third (new clause 21).

On new clause 19, Pat McFadden said:

> New clause 19 provides a power to remove or reduce burdens that result from legislation, and it defines what is meant by burden.[52]

The Bill, as originally introduced, unlike the *Regulatory Reform Act 2001*, had contained no condition that orders would have to remove burdens. Pat McFadden outlined the implications of the "new definition of 'burden'":

---

48 Cabinet Office, *Letter to Andrew Miller MP, Chairman of the Regulatory Reform Committee*, 12 April 2006, http://www.cabinetoffice.gov.uk/regulation/documents/bill/letter_am.pdf

49 *Supplement to Votes*, 3 May 2006, pp178-1799; see also Cabinet Office News Release CAB 022/06, *Government amends Legislative and Regulatory Reform Bill*, 4 May 2006, http://www.cabinetoffice.gov.uk/newsroom/news_releases/2006/060504_billamends.asp?ID=159

50 HC Deb 15 May 2006 c696

51 They are also described in the House of Lords Library – Library Notes LLN 2006/004, *Legislative and Regulatory Reform Bill [HL Bill 109, 2005-06]*, 8 June 2006, http://www.parliament.uk/documents/upload/HLLlegRegBill.pdf

52 HC Deb 15 May 2006 c699

> The new definition of "burden" will also allow us to target more effectively the order-making power on removing or reducing the burdens that businesses, charities and voluntary organisations wish to see removed.[53]

He offered the following explanation of the ambit of new clause 20:

> New clause 20 will provide a power for a Minister, by order, to make provision that he considers will ensure that regulatory functions are exercised so as to comply with the Better Regulation Task Force's five principles of good regulation, which state that regulatory activities must be carried on in a way that is transparent, accountable, proportionate, consistent and should be targeted only at cases in which action is needed. […]
>
> New clause 20 would also allow a Minister by order to amend the constitution of a body exercising regulatory functions under an enactment if doing so would make it more transparent and accountable. […]
>
> New clause 20 would also permit the creation of a new body to carry out the functions of existing regulators if the Minister considered that that would be for the purpose of securing that regulatory functions were exercised so as to comply with the five principles.
>
> Finally, if as a consequence of the creation of a new body or the transferral of a function, another regulatory body becomes obsolete, it may be necessary to abolish it. That, too, would be possible under the order-making power of new clause 20, if the Minister considers that it will ensure that regulatory functions are exercised so as to comply with the five principles of good regulation.[54]

Bridget Prentice explained that new clause 21 – on implementing Law Commission recommendations – contained provisions that were included in the Bill. However, because of other amendments to the Bill, they needed to be included in a new clause.[55]

Excepted Enactments

A new clause (26) was introduced (without debate or division[56]): orders made under this provision could not be used to amend or repeal any provision of the Act itself or the *Human Rights Act 1998* (clause 9 of HL Bill 109).

Reviewing the procedure for considering orders

The 21-day period for either House to request a more stringent procedure for considering an order (clause 13 of Bill 111) was extended to 30 days (clause 16 of HL Bill 109);[57] and

Veto

A power to recommend that no further proceedings be taken in relation to a draft order was introduced, irrespective of nature of the parliamentary proceedings on the order. This power would be available to committees considering the draft orders. However, the

---

53 HC Deb 15 May 2006 c702
54 HC Deb 15 May 2006 cc776-778
55 HC Deb 15 May 2006 c781
56 HC Deb 15 May 2006 c801
57 HC Deb 16 May 2006 c951

recommendation could be rejected by resolution of the House whose Committee made it (see clauses 17(4)(5)(6), 18(3)(4)(5) and 19(5)(6)(7) of HL Bill 109). Such provisions were not included in clauses 14, 15 or 16 of Bill 111.[58]

An amendment to give committees a veto that the House could not overturn was rejected by 258 votes to 200.[59]

c. Third reading

The Bill completed its passage through the House of Commons on 16 May 2006. Hilary Armstrong described the passage of the Bill in the context of the Government's better regulation agenda:

> We have sought to achieve a sensible balance between producing a Bill with the power to deliver better regulation—in which respect I confess we were ambitious—and ensuring that Parliament would play a full and constructive role in scrutinising proposals so that we could secure a better regulation agenda overall.[60]

She also commented on the role she expected Parliament and ministers to play in the order-making process:

> … the Government have made it clear that although we want to find an approach that does not place too much emphasis on our perception of how Parliament should act, we do not want to avoid the responsibility that Ministers must face in terms of how they behave. We have sought to get the balance right. We have listened carefully to what the House has said, and I have no doubt that we shall return to the matter.[61]

Both the Conservatives and the Liberal Democrats welcomed changes to the Bill but Oliver Heald did not consider that the Bill was yet ready to become law,[62] and David Heath enunciated a number of concerns that remained with the Bill:

> It been marginally improved over the past two days, but there are still deep concerns about the way in which it will operate, deep concerns about its scope and deep concerns about the Government's inability to provide a proper veto.[63]

Both of these parties voted against the Bill's third reading but it passed by 259 votes to 213.[64]

---

58 HC Deb 16 May 2006 cc951-952; 955-957
59 HC Deb 16 May 2006 cc951-955
60 HC Deb 16 May 2006 c960
61 HC Deb 16 May 2006 c963
62 HC Deb 16 May 2006 c964
63 HC Deb 16 May 2006 c965
64 HC Deb 16 May 2006 c965

E. Proceedings in the Lords

The Bill was introduced into the House of Lords on 17 May 2006 and received its second reading on 13 June 2006. It is expected to begin its committee stage in the House of Lords on 3 July 2006, and a number of amendments have already been tabled.[65]

The Bill has been the subject of inquiries by two committees in the House of Lords – the Delegated Powers and Regulatory Reform Committee and the Constitution Committee.

1. Select committee consideration

Both the Delegated Powers and Regulatory Reform Committee and the Constitution Committee published their reports on the Bill before it received its second reading in the House of Lords. Both committees expressed various concerns about the Bill, although the Delegated Powers Committee did not consider the order-making powers for regulatory reform to be "inappropriate".

a. Delegated Powers and Regulatory Reform Committee

Whilst it did not consider the order-making powers for regulatory reform to be inappropriate, the Delegated Powers Committee did express concerns about using delegated legislation to implement Law Commission recommendations. The Committee provided the following summary of its main conclusions:

> The purpose of this bill is to "enable provision to be made for the purpose of removing or reducing burdens resulting from legislation, promoting regulatory principles and implementing recommendations of the Law Commission[s]"[2]. It proposes the greatest delegation of power to Ministers that this Committee has seen. In short, however, we do not find the regulatory reform provisions inappropriate, although we question whether the 2001 Act could not itself have been amended. We consider that the other provision in Part 1, that about consolidation, simplification and the implementation of Law Commission recommendations, is unsuitable for delivery by delegated legislation; and we invite the House to consider whether primary legislation, subject to some special procedure, would be a more satisfactory way to legislate for such purposes. We draw attention to the power in Part 3 of the bill (the power to make ambulatory references to European Union legislation), but do not find it inappropriate.[66]

It outlined the major changes from the *Regulatory Reform Act 2001*:

> (a) There is no bar on amending legislation passed or amended less than 2 years before the order is made .
>
> (b) there is no general exclusion for burdens affecting only ministers or government departments

---

[65] see: Legislative and Regulatory Reform Bill – Amendments to be debated in the House of Lords, http://www.publications.parliament.uk/pa/ld200506/ldbills/109/amend/ldam109.htm

[66] Delegated Powers and Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 7 June 2006, HL 192 2005-06, para 2

(c) the burden need not affect someone "in the carrying on of any activity" and includes "administrative inconvenience"

(d) The order may itself confer power to legislate ("sub-delegation")[67]

In its conclusion on Part 1 of the Bill, it restated its concerns about the procedure for enacting Law Commission recommendations; it also questioned the restrictions the Bill imposed on the grounds committees could exercise the veto.[68] Although the Committee did not consider the power to sub-delegate was inappropriate, it considered that the power had not been fully argued through:

> The power to sub-delegate ((a)) is new because under the 2001 Act there is no express power for an order to confer power to legislate. We do not consider that sub-delegation is inappropriate, nor that sub-delegation to persons other than Ministers is necessarily inappropriate. **The case, however, for allowing an order to sub-delegate legislative power to any such person is, in our view, not sufficiently made out by paragraphs 122 and 123 of the memorandum, particularly as there is no provision for parliamentary control of the exercise of that power, and we consider that the bill should specify the categories of person (e.g. local authorities or professional regulatory bodies) who, in addition to Ministers, could by order be empowered to legislate**. We agree with the conclusion in paragraph 126 of the memorandum that a person to whom power to legislate was given by the order could not delegate that function to someone else and that the order could not enable that to be done.[69]

b. Constitution Committee

The Constitution Committee drew attention to three specific issues of constitutional importance:

> 4. We make this report to draw the following issues of constitutional importance to the attention of the House.
>
> - The manner in which the bill has been introduced, which raises concerns about the Government's approach to legislation with constitutional implications.
>
> - The bill delegates power to Ministers to change the statute book. When this was last done, in the Regulatory Reform Act 2001, the enabling provision was described as an "unprecedentedly wide power".
>
> - The bill delegates power to Ministers to change the statute book for the purposes of implementing Law Commission recommendations.

---

[67] Delegated Powers and Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 7 June 2006, HL 192 2005-06, paras 22-25

[68] Delegated Powers and Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 7 June 2006, HL 192 2005-06, para 76

[69] Delegated Powers and Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 7 June 2006, HL 192 2005-06, para 35

> 5. It will be for the House as a whole to determine whether the proposed delegation of these powers to Ministers is balanced with sufficient constitutional safeguards against inappropriate use. That assessment will need to have regard to the manner in which the delegated power is framed, the stated purposes for which Ministers may exercise their powers, the subject matter that is exempt from amendment or repeal by order, and the parliamentary procedures specified in the bill. **Our assessment is that although the bill now strikes a somewhat better balance than when first introduced to the House of Commons, the powers contained in the bill remain over-broad and vaguely drawn and there are further safeguards that could be accommodated in the bill which are necessary and would not jeopardise the achievement of the Government's better regulation goals.**[70]

2. Second reading

In the House of Lords, the second reading debate on the *Legislative and Regulatory Reform Bill* took place on 13 June 2006.[71] In opening the debate, Lord Bassam of Brighton outlined the purpose of the Bill:

> The purpose of the Bill is to provide an alternative legislative mechanism to Bill procedure for the Government to deliver swiftly those better regulation initiatives that are not highly controversial.[72]

He also summarised the implications of the changes made to the Bill during its passage through the House of Commons:

> The Bill before us now is not the one that noble Lords may have heard about with concern when it was first introduced in another place. The Bill has been amended substantially by the other place. Most significantly, the Bill now contains powers that are focused clearly on delivering better regulation initiatives.[73]

After outlining the ways in which the powers in Bill could be used, he acknowledged that they were "wide powers" but argued that "the Government have no intention to use them inappropriately". He continued:

> … but understand the importance of defining when they could be used. The Government have therefore included on the face of the Bill stringent safeguards for the use of the order-making powers. As I shall explain, these safeguards will ensure that the order-making powers will not be used in an inappropriate way.[74]

He made some commitments to further changes to the Bill and noted areas where the Government was aware of other parties' concerns:

- The Government will bring forward changes to the provisions on vetoes;
- Consideration will be given to restricting the power of orders to confer the power to legislate on any person;

---

70 Constitution Committee, *Legislative and Regulatory Reform Bill*, 8 June 2006, HL 194 2005-06, paras 4-5
71 HL Deb 13 June 2006 cc120-190
72 HL Deb 13 June 2006 c120
73 HL Deb 13 June 2006 c123
74 HL Deb 13 June 2006 c124

- The powers to implement Law Commission recommendations will be the subject of many amendments and the Government will work with other parties to find practical ways to implement those recommendations;
- The convention that Parliament does not legislate on internal Church of England matters without its consent will be upheld.[75]

While both the Conservatives and Liberal Democrats supported the principle of deregulation and welcomed the changes made to the Bill during its passage through the Commons, both parties expressed concerns about the Bill and highlighted areas where they considered further change to be necessary. Speaking for the Conservatives, Baroness Wilcox argued that:

> The Bill is not yet in a fit state to be passed by this House, but we hope that the Government will continue to listen so that by the time it leaves here, it will do so as a constitutionally sound but effective deregulatory weapon.[76]

For the Liberal Democrats, Lord Goodhart made similar comments:

> The changes introduced by the Government at that stage altered the Bill from being wholly unacceptable to a Bill that is acceptable in principle but still in need of major surgery.[77]

Both parties expressed concerns about various aspects of the Bill. Baroness Wilcox raised concerns that the order-making powers of Part 1 could be used to make changes to the principal economic regulators; the implementation of Law Commission recommendations; and about the provisions for parliamentary consideration of orders.[78] Lord Goodhart echoed these comments and added a concern about the subjectivity of determining whether an order is the appropriate way to reform primary legislation.[79] He also noted that the Government had agreed to a provision in the Bill that would prevent the order making power being used to amend the Act itself or the *Human Rights Act*. But he wanted this to go further and highlighted the Constitution Committee's list of 53 "statutes of a constitutional nature" and its proposal to refer "not to particular statutes but to principles" in specifying subjects of legislation that the order-making power could be used to amend.[80]

In the wider debate a number of peers mentioned elements in the reports on the Bill by the Constitution Committee[81] and the Delegated Powers and Regulatory Reform Committee.[82] They also expressed concern that the Bill had not been subjected to pre-legislative scrutiny.

---

75 HL Deb 13 June 2006 cc124-127
76 HL Deb 13 June 2006 c132
77 HL Deb 13 June 2006 c133
78 HL Deb 13 June 2006 cc130-132
79 HL Deb 13 June 2006 c134
80 HL Deb 13 June 2006 c135
81 Constitution Committee, *Legislative and Regulatory Reform Bill*, 8 June 2006, HL 194 2005-06
82 Delegated Powers and Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 7 June 2006, HL 192 2005-06

3. Committee stage

The Bill was further amended during its committee stage in the House of Lords, which began on 3 July 2006, continued on 10 July, and finished on 19 July.[83]

Lord Bassam of Brighton described the changes made to clauses 1 (amendment 20) and 2 (amendments 36-38) as "drafting improvements which are not intended to change the scope of those powers [i.e. the orders it is possible to make under clauses 1 and 2]". He described the amendments in the following way:

> Amendment No. 20 re-organises and makes minor changes to some of the provisions in Clause 1(7) and in doing so makes it clearer that orders made under Clause 1 may contain provision abolishing, conferring, or providing for the delegation of functions of any description, and that they may create new bodies or offices.
>
> Amendments Nos. 36 to 38 similarly improve Clause 2 to make it clearer what can and cannot be done under the power. In particular, the amendments make it explicit that an order under Clause 2 cannot create or abolish any new regulatory function. Clause 2 is about affecting the way in which regulatory functions are exercised, and not about changing those functions. The amendments clarify that it will be possible to create or abolish bodies only in the context of transferring regulatory functions to new bodies, and only then for the purpose of furthering the principles of better regulation set out in subsection (3).
>
> Amendments Nos. 68, 69, 86, 87 and 90 introduce minor drafting changes or consequential amendments to Clauses 5 and 15, and are considered necessary for the purposes of clarity.[84]

In response, Lord Kingsland, for the Conservatives said that his party was "rather circumspect" about these amendments. He expressed particular concern about Amendment 65, which Lord Bassam said restricted:

> … the persons or bodies eligible for such powers [that is powers to confer legislative functions] to three categories. The first is Ministers—the category of persons most likely to be given powers to legislate as part of future orders. The second category is persons or bodies who have functions under an enactment. That will ensure that powers to legislate will be conferred only on persons or bodies already recognised by Parliament as suitable. The third category is a body, or the holder of an office, which has been created by the order itself. That power will be useful, for example, in the case of mergers, where the successful transfer of function may necessitate the creation of a new body.[85]

Amendment 20 was agreed to.[86] Amendments 36-38 were agreed to on 10 July.[87] Amendment 65 was agreed to on 19 July 2006.[88]

---

83 HL Deb 3 July 2006 cc12-70 and 96-120; 10 July 2006 cc483-511 and cc565-580; 19 July 2006 cc1331-1404
84 HL Deb 3 July 2006 cc109-110
85 HL Deb 3 July 2006 c109
86 HL Deb 3 July 2006 c118
87 HL Deb 10 July 2006 c572
88 HL Deb 19 July 2006 c1358

Clause 3, which provided a "power to implement Law Commission recommendations", was removed from the Bill. Baroness Ashton of Upholland, the Parliamentary Under-Secretary of State, Department for Constitutional Affairs, explained:

> … I have listened with great care to all who have expressed a view on Clause 3. In particular, I have read the report of the Delegated Powers and Regulatory Reform Committee and the Constitution Committee. I am very grateful to the noble Lords, Lord Dahrendorf and Lord Holme, for spending time talking to me with their customary energy and clarity. They left me in no doubt about the failings of the clause as it stands. I have no hesitation, therefore, in supporting its removal.[89]

She also outlined the Government's intention to bring forward alternative provisions to implement Law Commission recommendations. She argued that: "It is right to try to find a solution that would enable uncontroversial reports to find their way through a parliamentary process", and concluded that:

> If we are successful in finding a proposal that commands government support and support throughout your Lordships' House and another place I shall endeavour to return on Report with it.[90]

A number of consequential amendments to the changes in clauses 1 and 2 and to leaving out clause 3 were agreed to over the three days.

In addition the Committee agreed to some changes to the parliamentary procedures for considering orders made under the *Legislative and Regulatory Reform Bill*. Lord Norton of Louth opened the debate on these procedures by discussing an amendment that would have caused all orders to be subject to the super-affirmative procedure, unless either House agreed to a less stringent procedure (Amendment 91). He said that the purpose of his amendment was "to ensure that Parliament exercises the responsibility to determine the procedure to be adopted in respect of an order under the Bill". He continued:

> I appreciate that ultimately Parliament can determine the procedure. However, I wish to shift the onus from the Minister to Parliament and for Parliament to adopt a proactive rather than a reactive role. My reasons are twofold. First, in terms of principle, I believe that Parliament should have greater responsibility than it presently has for determining its business. … My second point is specific to this provision. As the Bill stands, there is a danger of Parliament missing the significance of a particular order.[91]

Although he withdrew his amendment, Lord Norton indicated that he would "reflect on the drafting and come back to it".[92]

---

89 HL Deb 10 July 2006 c573
90 HL Deb 10 July 2006 c574
91 HL Deb 19 July 2006 cc1374-1375
92 HL Deb 19 July 2006 c1383

The Government supported amendments that removed the conditions for exercising the veto, whichever resolution procedure was adopted for considering. Lord Bassam of Brighton told the Committee that:

> … In the light of concerns that have been expressed during the Bill's passage through Parliament … the Government resolved to remove the criteria to which the statutory veto is currently tied.[93]

The four amendments that removed these conditions on the veto, irrespective of the parliamentary procedure under which the orders would be considered (Amendments 95, 101, 106 and 109) were agreed to.[94]

An earlier Government amendment (94) was described as "a minor drafting change to Clause 17 to clarify that the effect of exercising the veto, where orders are subject to the negative resolution procedure, is that the Minister cannot make the order".[95]

Amendments 114A-D were agreed to. These would allow subordinate provision orders to continue to be made under the 2001 Act to amend existing regulatory reform orders, despite the Bill's repeal of the 2001 Act.[96]

One further amendment (116) affected the Church of England:

> It exempts the Church of England from the provisions in Part 2 on the exercise of regulatory functions, and ensures that the order-making power in Clause 2 cannot be used in relation to the regulatory functions of the Church. This is consistent with the long-standing constitutional convention that the Government will not legislate on anything within the competence of the Church of England, which has *de facto* delegated powers, without first reaching agreement with it.[97]

Finally, the long title of the Bill was amended to reflect that the power to implement Law Commission recommendations had been removed from the Bill (Amendment 118).[98]

4. Report stage

On 26 October 2006, the report stage of the *Legislative and Regulatory Reform Bill [Lords – Bill 146]* was completed in the House of Lords.

The House agreed a number of further changes to the Bill. It also rejected a number of amendments. The amended Bill has been published as Bill 161.[99]

---

93 HL Deb 19 July 2006 c1379
94 HL Deb 19 July 2006 cc1383-1384
95 HL Deb 19 July 2006 c1379
96 HL Deb 19 July 2006 c1401
97 HL Deb 19 July 2006 c1402
98 HL Deb 19 July 2006 cc1403-1404
99 See the parliamentary page on the Bill: http://www.publications.parliament.uk/pa/pabills/200506/legislative_and_regulatory_reform.htm

Many of the changes that were agreed to were described by the minister as minor technical amendments and agreed to without a division.

Amendment No. 14 added a further precondition to the list that a minister has to satisfy before he can use the order-making power to change legislation. The House of Lords agreed to add:

> (f) the provision is not of constitutional significance.

Lord Bassam of Brighton told the House that the amendment:

> … creates a new precondition, which prevents a Minister from making provision in an order which he considers constitutionally significant. The only exception to this is that orders may restate constitutionally significant provisions, but only where this would make the law more accessible or easily understood. I am sure that noble Lords would agree that that is a highly desirable objective.[100]

He considered that this explicit provision was not necessary. However, he accepted that concern remained that "the order-making powers could be used to bring about fundamental constitutional change", so the amendment was tabled to "put the issue beyond any possible or reasonable doubt".[101] He argued that the way in which the amendment was drawn would prevent any constitutional change but it would not prevent all changes to provisions in "constitutional acts" as it would permit "trivial or consequential amendments to be made to statutes that are constitutional in nature". He argued that this would not be possible if the Bill contained a list of "constitutional acts" that could not be amended using the order-making powers contained in the Bill.[102]

Lord Norton of Louth introduced an amendment to Lord Bassam's amendment, which he argued addressed the question of "what constitutes a measure of constitutional importance?"[103]

Other amendments that would have prevented specific statutes from being amended by the order-making power (because they were considered to be of constitutional importance) were also discussed.

Lord Desai commented that "… this is a very interesting situation. We all agree that this Bill should not be allowed to alter the constitution, but we really do not know what the constitution is".[104]

Lord Norton withdrew his amendment and Lord Bassam's amendment (no. 14) was agreed to.

---

[100] HL Deb 26 October 2006 c1303
[101] HL Deb 26 October 2006 c1303
[102] HL Deb 26 October 2006 c1304
[103] HL Deb 26 October 2006 c1307
[104] HL Deb 26 October 2006 c1310

The Government proposed changes to the ways in which the order-making power could be used to affect taxation. Both amendments 20 and 21 were accepted, after Lord MacKenzie of Luton described the effect of them:

> Clause 5 restricts the powers in Clauses 1 and 2, preventing an order imposing or increasing taxation. Concerns were raised in Committee that, unamended, the Bill would leave it open for a Minister by order to reduce or remove taxation. That is not the intention. The first of these amendments will make it clear that an order under Part 1 cannot be used to impose, abolish or vary any tax.
>
> The second amendment concerns potential tax liabilities that could arise from the merger of regulators. When transferring regulatory functions from one regulator to another it may be necessary also to make provision in an order to transfer assets and liabilities from the old to the new regulator. In certain circumstances, without further provision, a transfer could result in inappropriate tax consequences for the transferor or transferee body that would arise solely because of the transfer. This amendment addresses those unwanted consequences.[105]

Two amendments proposed by opposition parties were rejected on divisions. The Liberal Democrats tabled an amendment that Lord Goodhart said sought to turn "the test for the validity of the order from a subjective test to an objective one" (Amendment No 1).[106] The amendment was defeated by 116 to 103.[107] Baroness Wilcox's amendment (No 18), to insert a new clause entitled "Independence of the Economic Regulators" was defeated by 110 to 96.[108]

The Government did not bring forward any proposals to re-introduce provisions to implement Law Commission recommendations. It would appear that explicit provisions on implementing Law Commission recommendations will not be included in the Bill. However, it may still be possible to use the general order-making provisions to implement Law Commission recommendations, subject to the restrictions on the order-making power in Part 1 of the Bill.

5. Third reading

The Bill was read a third time in the House of Lords and passed on 2 November 2006. The Bill was amended in the Lords.

During the debate on third reading, a further discussion took place on use of the order-making power to amend constitutionally significant statutes. Lord Goodhart who understood that "any changes to the Scotland Act would be regarded as matters of constitutional significance" and continued:

> I was therefore expecting a statement to that effect from the Minister. What he in fact said was different:

---

[105] HL Deb 26 October 2006 c1358
[106] HL Deb 26 October 2006 c1287
[107] HL Deb 26 October 2006 c1291
[108] HL Deb 26 October 2006 cc1343-1355

> "The Government are content that the new precondition would prevent any constitutionally significant amendments to the Scotland Act and the Government of Wales Acts, just as it would prevent constitutionally significant amendments to any other enactment".—[*Official Report*, 26/10/2006; col. 1305.][109]

However, Lord Bassam countered:

> On Report, the noble Lord, Lord Goodhart, said that he could not support a list of constitutional statutes because it would need constant updating and, importantly, because,
>
> > "many statutes contain provisions that are constitutionally important alongside those that are not".—[*Official Report*, 26/10/06; col. 1309.]
>
> This is exactly what the Government's amendment introducing the new constitutional precondition was intended to address. It is not easy to reconcile the noble Lord's statement with the proposition that any change to the Scotland Act would be of constitutional significance.[110]

Lord Goodhart withdrew his amendment.

The House of Lords also discussed the need to ensure that the provisions in a draft order to be considered by Parliament were compatible with the *Human Rights Act 1998*. Following a brief debate in which Baroness Ashton of Upholland argued that the combination of pre-conditions and existing conventions about the *Human Rights Act 1998* were satisfactory safeguards to ensure that the order was compliant with the *Human Rights Act*.[111]

There was a brief debate on the issue of regulatory principles and individual regulatory decisions.[112]

Further debate also took place on an amendment that would have required the Government, when implementing European Union directives, not to "include any provision that increase burdens on individuals and businesses in the United Kingdom that went beyond the burdens in the directive itself".[113] A similar amendment was debated during the Report Stage.[114]

All the amendments that were debated were withdrawn and the Bill passed its third reading and it was passed back to the House of Commons with amendments.[115]

In the House of Commons, Jack Straw, the Leader of the House, announced that the Commons would debate the Lords amendments on 7 November 2006.[116]

---

[109] HL Deb 2 November 2006 c408
[110] HL Deb 2 November 2006 c410
[111] HL Deb 2 November 2006 c415
[112] HL Deb 2 November 2006 cc415-423
[113] HL Deb 2 November 2006 cc423-426
[114] HL Deb 26 October 2006 cc1384-1391
[115] HL Deb 2 November 2006 c428
[116] HC Deb 2 November 2006 c460

F. Other reaction

1. Scottish Parliament's consideration of the Bill

As noted in the Research Paper, the Scottish Executive published a Legislative Consent Memorandum (LCM) under the Sewel Convention. It wished to adopt legislation made in Westminster under Part 3 of the *Legislative and Regulatory Reform Bill*.

The Scottish Parliament's Subordinate Legislation Committee considered the Legislative Consent Memorandum from the Scottish Executive,[117] on 21 February 2006. The Committee's deputy convenor, Gordon Jackson MSP, concluded:

> So, oddly enough, we do not have problems with that which doth concern us; we are just horrified by the things that do not concern us. That seems a fair summary of our position.[118]

The Committee received a further memorandum from the Scottish Executive outlining the amendments that had been proposed to Part 3,[119] which it considered on 7 March 2006.[120]

As the LCMs related to European legislation, the Scottish Parliament's European and External Relations Committee discussed them with George Lyon, the Deputy Minister for Finance and Public Service Reform at its meeting on 14 March 2006.[121] Although the LCM was concerned with Part 3 of the Bill dealing with European Union legislation and its translation into UK law, the Committee also asked the Minister about the implications of the wider order making powers for the devolution settlement.

In his opening remarks, George Lyon outlined the requirement for the LCM in connection with Part 3.[122] He later argued that consent for Part 1 and 2 was not required:

> I am, of course, aware of the views that have been expressed about parts 1 and 2 of the bill, as recorded in the committee's briefing paper for today's meeting. Although the Executive does not generally comment on reserved matters, it is worth clarifying that it is a matter for the United Kingdom Parliament to determine what legislative powers it wishes to delegate to UK ministers and the nature of the procedures and level of scrutiny associated with the exercise of such powers.[123]

---

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

[118] Subordinate Legislation Committee Official Report 21 February 2006 c1570 (Scottish Parliament), http://www.scottish.parliament.uk/business/committees/subleg/or-06/su06-0602.htm#Col1567

[119] Scottish Executive, *Legislative and Regulatory Reform Bill – Supplementary Legislative Consent Memorandum*, February 2006, http://www.scottish.parliament.uk/business/legConMem/pdf/LegRegRefLcm-sup.pdf

[120] Subordinate Legislation Committee Official Report 7 March 2006 c1621 (Scottish Parliament), http://www.scottish.parliament.uk/business/committees/subleg/or-06/su06-0802.htm#Col1621

[121] European and External Relations Committee *Official Report* 14 March 2006 cc1687-1701

[122] *Ibid* c1688

[123] *Ibid* c1689

He also noted Jim Murphy's confirmation that Scottish ministers would be consulted if regulatory reform orders made minor, consequential changes to devolved Scots law.

He was asked about using the proposed new powers to amend or repeal the *Scotland Act 1998*. He told the Committee:

> … We have been clear on the need for confidence in the security of the devolution settlement. … I can give the committee the assurance that we are engaged at the highest level to ensure that some of the concerns that have been raised can be addressed.[124]

But he later confirmed that the Executive had written, with similar concerns to those expressed by the European and External Relations Committee, to the UK Government.[125]

The Committee was not sure whether the LCM would be debated by the Parliament before its next meeting. However, on 16 March it wrote to the Minister and invited him to appear again on 28 March. He replied, suggesting that that he would attend its meeting on 25 April:

> In order to allow the Scottish Executive to further consider the Committee's concerns, and in the light of the procedural timescale for the Bill in the UK Parliament, I suggest I come to the Committee's meeting on 25 April. Appearing on that date would allow me to make the position surrounding the Committee's concerns clearer. I would write in advance of my appearance setting out further detail on the concerns discussed at my appearance on 14 March.[126]

In the course of the Committee's meeting on 28 March 2006, the Convenor confirmed that the *Legislative and Regulatory Reform Bill* would be considered again on 25 April.[127]

However, that consideration did not take place, and at its meeting on 20 June 2006, the European and External Relations Committee's Convenor reported that the Bill had been significantly amended; and that the Scottish Executive was still expected to give evidence to the Committee, on the Bill. He said that this would take place after the Scottish Parliament's summer recess but in time for an LCM to be agreed before Westminster reconvened in October.[128]

On 26 September 2006, the Scottish Parliament's European and External Relations Committee took further evidence from George Lyon and Murray Sinclair, head of the constitution and parliamentary secretariat, on the Legislative Consent Memorandum for the *Legislative and Regulatory Reform Bill*. They discussed the effect of the, at that stage proposed, amendment to include a further pre-condition preventing the order-making power

---

[124] *Ibid* c1691
[125] *Ibid* cc1692-1693
[126] Correspondence from the Convener to the Deputy Minister for Finance and Public Service Reform, dated 16 March 2006, regarding the Legislative Consent Memorandum for the Legislative and Regulatory Reform Bill and Correspondence from the Deputy Minister for Finance and Public Service Reform to the Convener, dated 22 March 2006, http://www.scottish.parliament.uk/business/committees/europe/papers-06/eup06-05.pdf
[127] European and External Relations Committee *Official Report* 28 March 2006 c1749
[128] European and External Relations Committee *Official Report* 20 June 2006 c1974

from being used to if a provision was of constitutional significance. They told the Committee that:

> **George Lyon:** Our view is that the amendment protects the 1998 act. We believe that the 1998 act is a constitutional act and therefore that any attempt to use regulatory reform orders to amend it would be ultra vires.
>
> **Murray Sinclair:** Because of the constitutional significance of the Scotland Act 1998—in effect, it sets up a written constitution for devolved Scotland—any amendment to it would be of constitutional significance within the meaning of the new amendment.[129]

The LCM was debated by the Scottish Parliament in plenary session on 5 October 2006.[130] In introducing the motion, George Lyon observed that:

> Members will know that cross-party concern was expressed that the reserved parts of the bill as first published arguably left open the possibility that the Scotland Act 1998 and the devolution settlement could be unpicked by regulatory reform orders. Since its publication, the UK bill has been extensively revised by the Commons and the Lords. Those changes and the amendment that was tabled on constitutional matters last Monday mean that, as no part of the 1998 act can be said not to be "of constitutional significance", we are confident that the powers could not in practice be used to amend that act.[131]

There was some opposition to the LCM, and it was approved after a division:

> For 102, Against 5, Abstentions 7[132]

2. Press coverage, briefings and blogs

Details of debate in the newspapers on the Bill, briefing material produced by other organizations and blogs dedicated to the Bill are given in earlier versions of this Standard Note.

---

[129] European and External Relations Committee [Scottish Parliament], *Official Report*, 26 September 2006, cc2075-2076, http://www.scottish.parliament.uk/business/committees/europe/or-06/eu06-1302.htm#Col2070

[130] SPOR 5 October 2006 cc28336-28341, http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-06/sor1005-02.htm#Col28336

[131] SPOR 5 October 2006 c28336

[132] SPOR 5 October 2006 cc28347-28349