



House of Commons
Regulatory Reform Committee

Scrutiny of Regulatory Reform Orders

**First Special Report of Session
2006–07**

*Report, together with formal minutes, and
written evidence*

*Ordered by The House of Commons
to be printed 12th December 2006*

HC 160

Published on 15th December 2006
by authority of the House of Commons
London: The Stationery Office Limited
£0.00

The Regulatory Reform Committee

The Regulatory Reform Committee is appointed under Standing Order No. 141 to consider and report to the House of Commons on proposals for regulatory reform orders under the Regulatory Reform Act 2001 and, subsequently, any ensuing draft regulatory reform order. It will also consider any "subordinate provisions order" made under the same Act.

Current membership

Andrew Miller (*Labour, Ellesmere Port & Neston*) (Chairman)
Gordon Banks (*Labour, Ochil and South Perthshire*)
Lorely Burt (*Liberal Democrat, Solihull*)
Mr James Gray (*Conservative, North Wiltshire*)
Stephen Hammond (*Conservative, Wimbledon*)
John Hemming (*Liberal Democrat, Birmingham, Yardley*)
Mrs Sharon Hodgson (*Labour, Gateshead East & Washington West*)
Mr Stewart Jackson (*Conservative, Peterborough*)
Dr Doug Naysmith (*Labour/Co-operative, Bristol North West*)
Mr Jamie Reed (*Labour, Copeland*)
Alison Seabeck (*Labour, Plymouth, Devonport*)
Mr Andrew Slaughter (*Labour, Ealing, Acton & Shepherd's Bush*)
Ms Angela C Smith (*Labour, Sheffield, Hillsborough*)
Mr Anthony Steen (*Conservative, Totnes*)

Criteria against which the Committee considers each proposal

Paragraph (6) of Standing Order No.141 requires us to consider any proposal for a regulatory reform order against the following criteria:

... whether the proposal—

- (a) appears to make an inappropriate use of delegated legislation;
- (b) removes or reduces a burden or the authorisation or requirement of a burden;
- (c) continues any necessary protection;
- (d) has been the subject of, and takes appropriate account of, adequate consultation;
- (e) 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 payment;
- (f) purports to have retrospective effect;
- (g) gives rise to doubts whether it is *intra vires*;
- (h) requires elucidation, is not written in plain English or appears to be defectively drafted;
- (i) appears to be incompatible with any obligation resulting from membership of the European Union;
- (j) prevents any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise;
- (k) satisfies the conditions of proportionality between burdens and benefits set out in sections 1 and 3 of the Regulatory Reform Act 2001;
- (l) satisfies the test of desirability set out in section 3(2)(b) of the 2001 Act;
- (m) has been the subject of, and takes appropriate account of, estimates of increases or reductions in costs or other benefits which may result from its implementation; or
- (n) includes provisions to be designated in the draft order as subordinate provisions.

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at www.parliament.uk/regrefcom. A list of Reports of the Committee in the present Session of Parliament is at the back of this volume.

Committee staff

The current staff of the Committee are Mick Hillyard (Clerk), Stuart Deacon (Committee Specialist) and Liz Booth (Secretary/Committee Assistant).

All correspondence should be addressed to the Clerk of the Regulatory Reform Committee, Delegated Legislation Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 2837; the Committee's email address is regrefcom@parliament.uk.

Contents

Report	<i>Page</i>
Summary	3
1 Introduction	5
Background	5
The amended Bill	7
Changes required in the Committee's procedures and Standing Orders	8
To facilitate debates	8
To allow Subordinate Provisions Orders to be scrutinised	10
To amend the criteria	11
To increase the 15 days limit for the second stage report	11
Standing Order 141 (13) giving Departments the opportunity at every stage	12
Review of the 2006 Act	12
Committee resources	12
Annex: Amended Standing Orders	13
Formal minutes	19
List of written evidence	20
Reports from the Regulatory Reform Committee in the last Session	
	<i>inside back cover</i>

Summary

The Legislative and Regulatory Reform Act 2006, which comes into effect on 8 January 2007 and replaces almost all of the Regulatory Reform Act 2001, requires changes to be made to the way that draft Orders are scrutinised by the House and specifically by us, as the Committee charged with scrutinising draft Regulatory Reform Orders. This Special Report considers the draft Standing Orders that have been issued by Pat McFadden MP (Cabinet Office Minister) and recommends a number of amendments. The most significant change to the draft Standing Orders concerns providing more opportunities to Members to debate draft Orders. We set out the case for providing us with the power to obtain a debate in a Delegated Legislation Committee on draft Regulatory Reform Orders that we consider to be of sufficient legal and political significance without having to divide or contrive a division. We also call for our current procedures to apply in connection with the draft Orders that we oppose, or do not approve unanimously, namely: that the Government's motion to approve such draft Orders should be debated on the floor of the House. In addition, we set out the case for:

- continuing to allow us to scrutinise a surviving 2001 Act category of statutory instrument (Subordinate Provisions Orders), rather than transferring such Orders to the Joint Committee on Statutory Instruments and losing a power to express an opinion as to the acceptability of those Orders;
- amending the wording in some of the tests that we will apply when scrutinising draft Orders to make them less subjective and a better match with the tests set out in the Act;
- clarifying that the instruction to report within 15 days on every second stage report relates only to unrevised draft Orders; and
- removing the instruction that we automatically provide departments with opportunities to present written or oral evidence at every phase of the scrutiny process.

1 Introduction

1. The Legislative and Regulatory Reform Act 2006 received its Royal Assent on 8 November. Its provisions, which come into force on 8 January, will establish new procedures for scrutinising draft Regulatory Reform Orders (RROs) and may lead to different forms of draft Orders being laid compared with those laid under the Regulatory Reform Act (RRA) 2001.

2. To date, 29 RROs have been made under the RRA 2001. These have been scrutinised by us and our predecessor Committee on behalf of the House in accordance with our Order of Reference (currently Standing Order No. 141) and Standing Order No. 18, which governs the consideration of draft Orders by the House.

3. This Special Report sets out what we believe are the changes required to our Standing Orders in the wake of the new Act. The Cabinet Office has produced a draft of the revised Standing Orders (No. 18 and 141).¹ While we welcome much of this draft, we recommend that it be amended in a number of important respects. For convenience, we set out our recommended amendments in annex one, but in order to put these changes into context, we briefly set out the background to the Legislative and Regulatory Reform Act and our explanations for recommending amendments to the draft Standing Orders issued by the Cabinet Office.

Background

4. On 20 July 2005, the Government published its review of the Regulatory Reform Act 2001 and its consultation document on possible changes entitled *A Bill for Better Regulation*.² The Legislative and Regulatory Reform Bill was presented to Parliament on 11 January 2006. Part 1 of the Bill, which attracted most attention, was promoted as providing a much needed and effective way of removing red tape and bureaucracy. This declared aim of tackling unnecessary controls was widely supported. In reality, however, Part 1 of the Bill would have done much more than this. It was a major law reform measure that proposed, amongst other things, to give Ministers the potential power to amend or repeal virtually any legislation by means of an Order, including providing a streamlined procedure for implementing Law Commission proposals. Although the Bill included certain safeguards, such as various statutory conditions to be satisfied (in the opinion of the Minister), it was clear that the Bill as initially presented would provide Ministers with an extraordinarily wide power, including power to reform the common law by Order.

5. Before the Bill was presented, we requested that it be subject to pre-legislative scrutiny or failing that that there be a sufficient delay between the Bill's first and second readings to allow us reasonable time to conduct a full examination of the Bill and to report our views to the House before second reading. Unfortunately, the Cabinet Office rejected our requests and on presentation of the Bill we were given very little time to undertake a detailed scrutiny of the Bill before the Bill's second reading debate. Notwithstanding the tight

¹ See Appendix A [Pat McFadden's letter]

² *A Bill for Better Regulation: Consultation Document*, Cabinet Office, July 2005

deadline, and in view of the level of our concern, we agreed our special report on the Bill within just 20 days of the Bill being presented and published it on 6 February, three days before the Bill's second reading.³ Our overall view, and one that subsequently became widely shared, was that despite being promoted simply as a means to remove unnecessary regulation, the Bill had the potential to be the most constitutionally significant Bill to be brought before Parliament for some years. While we supported the declared aims of Part 1 of the Bill, we expressed our concerns over the disproportionate scope of the Ministerial powers being proposed and called for the Bill to be rebalanced in favour of more effective Parliamentary scrutiny. We invited the House to consider further safeguards within the Bill as a way of limiting the scope of the proposed powers. Our special report, which we believe, was comprehensive, critical and constructive, included the following main features:

- a critique of the Cabinet Office's preparation leading up to the Bill being presented, specifically the quality of the (delayed) review into the 2001 Act and the way in which the consultation was handled and summarised;
- original research refuting the Cabinet Office's allegation that streamlining of Parliamentary scrutiny procedures was necessary in order to increase the pace of regulatory reform Orders being made;
- detailed analysis of the Bill's provisions to streamline Parliamentary procedure;
- detailed options for reducing the scope of the Bill to a level proportionate with its declared aims and rebalancing the Bill in favour of effective Parliamentary scrutiny, including suggesting further safeguards, such as providing a Committee veto against the use of the Order-making power for inappropriate purposes, off-limit areas of key legislation (i.e. areas where the new powers could not be used to effect amendments or repeals) and longer time periods for the Committee to scrutinise draft Orders; and
- recommendations for changing our Standing Orders, including granting the power to trigger debates without having to divide.

6. During March and April, three other Committees in the Commons (Procedure, Joint Committee on Human Rights and the Public Administration Select Committee) produced critical reports. The various reports revealed a broad degree of consensus in favour of rebalancing the Bill in the general direction recommended in our report. There was support for off-limit areas being specified on the face of the Bill, such as the Human Rights Act and Part 1 of the Bill itself and some support for a Committee veto to be put on the face of the Bill so that further proceedings on a draft Order could be halted if we (or our sister Committee in the Lords) consider a draft Order to be inappropriate for delegated legislation. In June, two Committees from the Lords (Delegated Powers and Regulatory Reform Committee and Constitution Committee) also published reports expressing support for rebalancing the Bill.

³ See Regulatory Reform Committee's First Special Report of Session 2005-06, *Legislative and Regulatory Reform Bill*, HC 878 and the Government's Response, HC 1004. The Government's response to our special report was supplied to us just before the start of the Committee stage of the Bill. We arranged for the response to be made available in the Library.

The amended Bill

7. During the early stages in the Commons, the then Minister (Jim Murphy MP) resisted all arguments in favour of substantive amendments to the Bill. For example, no significant concessions were made during the Committee stage of the Bill, although late during Committee stage the Minister did accept the principle that the Committee charged with examining a draft Order should be given some form of statutory veto on the use of procedure.⁴ On 4 May, just before the report stage in the Commons, the Government tabled 65 amendments to its Bill, including amendments to leave out two of the most significant and controversial clauses (clauses 1 and 2) and replace them by a more limited power for Ministers to make changes to legislation, and a restricted Committee veto. During proceedings in the Lords, the Government made further significant amendments by dropping all clauses relating to Law Commission proposals and adding explicit limits on the degree of sub-delegation that Orders can provide. The main changes to the initial version of the Bill were as follows:

- a) the Bill's controversial wide power of "reforming legislation" was replaced with the more constrained power "to reduce or remove burdens";⁵
- b) two off-limits statutes were specified on the face of the Bill so that no Order made under the Bill could make amendments to them: they were Part 1 of the Bill itself and the Human Rights Act 1998;
- c) the period during which the relevant Committees could change the Minister's recommended procedure for each draft Order was increased from 21 days to 30 days;
- d) a statutory veto (i.e. the power to stop further proceedings being taken in relation to any draft Order, subject only to a resolution to overrule by the House itself) was granted to the relevant Committee in each House;⁶
- e) provisions relating to Law Commission recommendations were deleted;
- f) explicit limits on the power to sub-delegate were added;
- g) further limits on the power to change taxes were added; and
- h) a further precondition that Orders cannot contain provisions that are considered by the introducing Minister to be of "constitutional significance" was added to the Bill.

8. In broad terms, the Bill was amended in the general direction that we recommended in our special report at the start of the year. While we welcome the improvements that were made to the Bill, we suspect that had it been subject to pre-legislative scrutiny, as we had requested at the time, we could be looking at an even better Act - one that would work better to the mutual benefit of Parliament and the Executive.

4 The Minister subsequently reaffirmed this undertaking in a letter to our chairman on 12 April 2006. See Appendix B

5 Unlike the purposely restrictive legal concept of burdens in the 2001 Act, the Government's amendments proposed a wide and general definition.

6 This recommendation would be binding unless overturned by a resolution of the House. The Government originally tabled a limited veto, but the constraints on the use of this veto were subsequently removed by a Government amendment during the Bill's progress through the Lords.

Changes required in the Committee's procedures and Standing Orders

9. The Legislative and Regulatory Reform Act 2006, which will come into effect on 8 January 2007, requires changes to be made to the way that draft Orders are scrutinised by the House and specifically by our Committee.⁷ For example, under the new legislation, draft Orders will be subjected to one of three procedures (negative, affirmative or super-affirmative) instead of the existing one (super-affirmative). The new legislation also includes some new tests and a possible Committee veto.

10. At present, the handling of Regulatory Reform Orders is governed by our Order of Reference (currently Standing Order No. 141) and the Standing Order (No 18) relating to the consideration of draft Orders by the House. These Standing Orders now need to be significantly amended to reflect the changes brought about by the new legislation. It would be desirable for the House to approve the new Standing Orders in good time before any new draft Orders are laid, which is not expected to be before March. The task of approving our new Standing Orders within the deadline has been made easier by Pat McFadden MP (Cabinet Office Minister) issuing draft Standing Orders. We and the Procedure Committee have been invited to comment on them.⁸

11. From the outset, we should say that we welcome certain aspects of the Minister's draft. For example, we welcome the wider remit that our Committee has been given that will allow us to conduct inquiries into "regulatory reform" generally (Standing Order 141(1)). This expanded role is in line with our recommendation in our special report.⁹

12. However, we are concerned that another major recommendation made in our special report relating to our Standing Orders has not been incorporated into the draft Standing Orders, namely: our wish to have the power to refer certain draft Orders for debate. We discuss this omission below.

13. Annex 1 sets out our suggested deletions and additions to the Minister's draft version of the Standing Orders covering the consideration of draft Orders (currently Standing Order No. 18) and our Order of Reference (currently Standing Order No. 141). For convenience, we also set out below a brief explanation of the major amendments in the following paragraphs.

To facilitate debates

14. Under the current Standing Orders, a debate on a draft Order is required only if the Government tables a motion to approve a draft Order on which we have previously recommended that no further proceedings be taken, or where we have approved a draft Order following a division.¹⁰ A Government motion to approve a draft Order would be

7 New draft orders subject to the new procedures are not expected to be laid before March, although some proposals for draft orders under the 2001 Act are expected to be laid before that date.

8 Over recent weeks, informal discussions have been held between officials from the Cabinet Office and staff from the Regulatory Reform Committee and the Procedure Committee. The views of the Procedure Committee were communicated to us in a letter from the Chairman (dated 7 December), which is published as Appendix C

9 *op cit*.

10 See paragraphs (1b) and (2) of Standing Order 18

debated on the Floor of the House for a maximum of three hours in the former case and a one and half hour debate in the latter. To date no such debate has been required on any of the 29 RRO approved.

15. A debate on the adjournment in Westminster Hall on fire safety was organised by the Government in response to a recommendation by the previous Committee following its consideration of the Fire Safety RRO proposal. That draft Order was approved by our predecessor without a division.¹¹ During the debate, which lasted some three and half hours, Members gave a general welcome to the opportunity to debate the Government's proposed Order. That debate clearly provided a valuable additional means by which the wider views in the House could be gauged and used to supplement our own technical scrutiny of the Order.

16. In our special report on the Bill, we recommended that we be given the power to secure a debate on a particular Order, without the requirement to divide. We strongly believe that we should be able to secure a debate on any particular draft Order which we consider to be of sufficient legal or political importance as to warrant one. We are mindful of occasions when Members expect to have an opportunity to comment on an Order, even if we consider the Order to be appropriate for delegated legislation. Furthermore, we consider that it would be illogical and inconsistent for draft Regulatory Reform Orders that might be making significant amendments to primary legislation not to be debated at all, unless we issue an adverse report or are unable to approve a draft Order unanimously, whereas normal statutory instruments subject to the affirmative procedure would be debated routinely. The absence of a power to secure a debate is especially worrying, since future draft Orders may be more controversial than those generally laid under the 2001 Act. As we said in our special report, a particular strength of the RRO process compared with the Bill procedure is that individual articles of an Order can be subject to very detailed analytical scrutiny. However, we are also mindful that, when compared with the normal Bill procedure, the RRO process suffers a particular weakness, namely the lack of opportunities for other Members of the House to debate Orders that amend primary legislation that can potentially affect their own constituents. We believe that the RRO process would be enhanced if where we considered Orders to be of sufficient legal or political importance to warrant a debate, such a debate could be secured without a requirement that we divide on the draft Order. We therefore consider that the Minister's draft Standing Orders should be amended to allow us to refer those draft Orders that we consider to be of sufficient legal or political importance to a Delegated Legislation Committee. This, we understand, can be achieved by treating such a recommendation in our reports as an automatic referral to a Delegated Legislation Committee. This power would be similar in kind to that which is currently exercised by the European Scrutiny Committee (ESC). We recognise that there are differences between the work of ESC and our Committee, not least that documents it scrutinises are generated in Brussels and that the purpose of any report or debate is to give the responsible Minister a steer in relation to Council proceedings where the Council is the decisive institution. We consider that, in relation to the draft Orders that we will scrutinise, the relevant Minister has a far more

¹¹ *Proposal for the Regulatory Reform (Fire Safety) Order 2004*, Eleventh Report of Session 2003-04, HC 684. Our previous Committee's report on the fire safety proposal was tagged as a relevant document.

significant role, which in our view makes it all the more desirable for us to be able to trigger a debate if necessary.

17. Under our current Standing Orders, if we approve a draft Order following a division, the subsequent motion made by a Minister of the Crown to approve such draft Orders is debated for up to one and a half hours on the floor of the House. The draft Standing Orders has the debate taking place in Delegated Legislation Committee. We consider this unacceptable.

18. We recognise that the Government could, if it felt strongly enough, overturn our referral of a draft Order to a Delegated Legislation Committee, but equally the Government may decide that a particular draft Order warrants a debate to be held in Westminster Hall, or even on the Floor of the House. **We recommend that the draft Standing Orders be amended to provide us with the power to refer Orders for debate in Delegated Standing Committees that we consider to be of sufficient legal and political significance without having to divide or contrive a division. For draft Orders that we do not approve unanimously, we recommend that our current procedures continue and that any subsequent motion made by a Minister of the Crown to approve such draft Orders should be debated for up to one and a half hours on the floor of the House.**

To allow Subordinate Provisions Orders to be scrutinised

19. As drafted, the revised Standing Orders propose to transfer scrutiny of any Subordinate Provisions Order to the Joint Committee on Statutory Instruments (JCSI). Subordinate Provisions Orders which may be made under RROs made under the 2001 Act are similar to other statutory instruments, but are not subject to the consultation and scrutiny procedures required for the main Regulatory Reform Orders.¹² In our view, an important element of scrutiny would be lost by this transfer. Under the current procedures, we are able to scrutinise such Orders in two ways. First, we scrutinise the technical qualities of such Orders to ensure that they are in Order. This requires us to apply the same tests as those applied by the JCSI when assessing other statutory instruments: examining the technical qualities of such instruments and determining, for example, whether the Orders are defectively drafted or of doubtful *vires*. Second, we also reach a conclusion on whether an Order or draft Order should be annulled or not be approved (as the case may be) and report our opinion to the House.¹³ This second task allows us to assess Subordinate Provisions Orders on grounds other than their narrow technical qualities and, if necessary, to express our opinion on the desirability of any Subordinate Provisions Order. JCSI is not able to express such an opinion. We believe that the House should not lose this second element of scrutiny. In his letter to us, David Maclean MP, chairman of the JCSI, reported that it was his Committee's view also that the House should not lose such a power to express an opinion on the merits and desirability of Subordinate Provisions Orders and that his Committee had no wish to see its own role expanded to include such a power.¹⁴ **We recommend that Subordinate Provisions Orders should continue to be scrutinised**

12 Subordinate Provisions Orders cannot be made under the 2006 Act.

13 See paragraphs (4) and (8) of Standing Order No. 141

14 Appendix E (Letter from the Chairman of JCSI)

in the Commons by our Committee as now and the draft Standing Orders be amended accordingly.

To amend the criteria

20. The draft Standing Orders (141(3)) sets out the criteria that we will use when scrutinising draft Orders and is largely based on the list of tests in our current Standing Orders. In our view, it represents a helpful sequence of considerations likely to be brought to bear on any draft Order. It should be noted that the criteria require us to form our own views as to whether any Order passes the various tests (rather than just reaching a conclusion on the rationality of the responsible Minister's views). Similarly, the wording in the introduction "the Committee shall *include in its consideration* in each case" makes it clear that the set of instructions is not intended to prevent us from considering other matters which might seem to us to be pertinent in any particular case.

21. While we are content with the level of detail set out in the draft Standing Orders, we have concerns about the wording of individual criteria. As the scrutinising Committee, we believe that in applying the criteria we should be concerned with the actual legislation and its effects and not with what the Minister may have intended. **We therefore recommend that the wording in 141(3b and 3c) be changed from the subjective to the more objective. This amendment also has the added advantage of providing a better match with the tests set out in the Act.**

To increase the 15 days limit for the second stage report

22. The draft Standing Orders (141(7)) contains the current instruction that under the super-affirmative procedure we must produce our second stage report within 15 days of the draft Order being laid.¹⁵ We and our predecessor Committee have always fully complied with this instruction. However, given that under the new legislation the number of draft Orders is expected to increase and may also include more controversial draft Orders, we suspect that while we should be able to report within 15 days in most cases, we may occasionally find it difficult to comply fully with this instruction while also maintaining effective scrutiny of each draft Order. We believe that the risk of breaching the instruction to report within 15 days is most likely to occur if the Government decides not to follow a specific recommendation to amend a proposal made in a first stage report, or amends the draft Order in an unexpected way, especially if we need to request further evidence from departments and elsewhere before completing our scrutiny of a draft Order. In short, 15 days for a second stage report may not always allow sufficient time for us to complete our scrutiny of the Government's case. The deadline also runs the real but unnecessary risk that if we have insufficient time to undertake proper scrutiny on behalf of the House, we might feel compelled to consider applying the veto. Therefore, **we envisage that we will always report within 15 days when there are no new second stage issues to consider, but for revised Orders we can only report as promptly as is reasonably possible. We recommend that the draft Standing Orders be clarified accordingly by amendment.**

¹⁵ Defined as 15 sitting days.

Standing Order 141 (13) giving Departments the opportunity at every stage

23. Standing Order 141 (13) requires that we give departments an opportunity to provide oral or written evidence before reporting at, on the face of it, every stage of the scrutiny process. This instruction could prove to be very bureaucratic and could expose us to the risk of breaching some statutory time limits. For example, we may need to report before the 30 days limit (questioning the recommended procedure); between 30 and 40 days (reporting on negative and affirmative draft Orders), before 60 days (first stage of the super affirmative procedure); and (if draft 141(7) survives in its present form) within 15 days for the second stage super-affirmative procedure. The proposed requirement that at every occasion we seek oral or written evidence from departments is unnecessarily burdensome. Other Committees function perfectly well and provide their respective departments with reasonable opportunities to provide oral or written evidence without the need for such an instruction. We, like any other parliamentary Committee, will provide departments with reasonable opportunities within the limitations imposed on us by the Act and **recommend that the Standing Order 141(13) be deleted.**

Review of the 2006 Act

24. In agreeing the 2001 Act, the Government committed itself to conducting a review into the workings of the Act within three years of it being passed. Although we had criticisms of the way that review was conducted, we consider that it is desirable to hold timely reviews of such legislation. **We therefore recommend that the working of the LRRA 2006 be reviewed within three years and that the review include a genuine validation of any costs and benefits or Regulatory Impact Assessments that are produced in support of all draft Orders; and that the Government report its findings to Parliament.**

Committee resources

25. Although the new legislation may increase the number of draft Orders, it is difficult to predict how much departments will actually use the new powers and the complexity of future Orders. Given these uncertainties, it is possible that our existing limited resources will be put under strain if we are called upon to scrutinise significantly more Orders or more complex Orders within the tighter deadlines. It is imperative therefore that the House and the Department of the Clerk are able to respond speedily to any significant increase in activity. In the first instance, we would expect to be able to draw on staff in the Scrutiny Unit to be seconded in relation to specific Orders or stages of them, so as to provide assistance to the regular staff advising the Committee. However, if the work commitment associated with scrutinising draft Orders is maintained at a higher level, then we would expect the additional resources to be provided on a more permanent basis. The tasks of organising the necessary resources will be made easier if the Cabinet Office, as the body coordinating RROs, is able to provide regular updates to us on departments' future plans to legislate by RRO, over and above the information they already helpfully provide on possible laying dates of proposals.

Annex: Amended Standing Orders

Consideration of ~~draft~~ Regulatory Reform Orders

(Showing our recommended **additions** and ~~deletions~~ to the Minister's draft Standing Orders)

18.—(1) If the Regulatory Reform Committee has recommended under paragraphs (4) or (6) of Standing Order No.141 (Regulatory Reform Committee) that a draft Order laid before the House under Part 1 of the Legislative and Regulatory Reform Act 2006 should be approved the following procedures shall apply:

(a) if the recommendation was agreed by the committee **as specified in paragraph (4)(a) or (6)(a) of Standing Order No.141 (without division)**, the question on any subsequent motion made by a Minister of the Crown to approve the draft Order shall be put forthwith; and

(b) if the recommendation was made **as specified in paragraph (4)(b) or (6)(b) of Standing Order No.141 after a division**, the draft Order shall stand referred to a Delegated Legislation Committee and paragraphs (5) and (6) of **Standing Order SO No 118 (Delegated Legislation Committees)** shall apply to proceedings on the draft Order;

Provided, in both cases, that in respect of a draft Order subject to the super-affirmative procedure such a recommendation has been made after the expiry of the 60-day period as defined under the Act.

(c) if the recommendation was made as specified in paragraph (4)(c) or (6)(c) of Standing Order No.141 the question on any subsequent motion made by a Minister of the Crown to approve the draft Order shall be put not later than one and a half hours after the commencement of proceedings on the motion.

Provided that in respect of a draft Order subject to the super-affirmative procedure such a recommendation has been made after the expiry of the 60-day period as defined under the Act.

(2) If the committee has recommended under paragraphs (4) or (6) of Standing Order No.141 (~~Regulatory Reform Committee~~) that a draft Order subject to the affirmative or super-affirmative procedure be not approved, no motion to approve the draft Order shall be made unless the House has previously resolved to disagree with the committee's report:

Provided that in the case of a draft Order subject to the super-affirmative procedure such a recommendation has been made after the expiry of the 60-day period as defined under the Act.

(3) No motion may be made to overturn a recommendation from the committee that,

(a) in respect of a draft Order subject to affirmative or super-affirmative procedure, no further proceedings be taken on the draft Order, or

- (b) in respect of a draft Order subject to the negative procedure, that an Order in the terms of the draft Order be not made,

unless—

- (a)(c)** it is made by a Minister of the Crown **in the same session**; and
- (b)(d)** notice of the motion has been given at least 10 sitting days previously.

(4) The questions necessary to dispose of proceedings on a motion —

- (a) to disagree with a report from the committee under paragraph (2);
- (b) to overturn a recommendation from the committee under paragraph (3); or
- (c) to do both in respect of the same draft Order

shall be put not later than three hours after their commencement; and the question on any motion thereafter made by a Minister of the Crown that the draft Order be approved shall be put forthwith.

(5) If the committee recommends that a draft Order subject to the negative **resolution** procedure should not be made, **any notice of a motion to overturn that recommendation shall be deemed to constitute notice of a motion under paragraph (3) (4)(a) of Standing Order No 118 (Standing Committees on Delegated Legislation)**.

(6) Motions to which this Order applies may be proceeded with, though opposed, until any hour.

141. (1) There shall be a select committee, called the Regulatory Reform Committee, to examine and report on—

(i) every draft Order laid before the House under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006;

(ii) any **Subordinate Provisions Order or draft of such an Order made or proposed to be made under sections 1 and 4 of the Regulatory Reform Act 2001 (except those not made by a Minister of the Crown)**;

(iii) any matter arising from its consideration of such Orders or draft Orders; and

(iv) matters relating to regulatory reform.

(2) In the case of every draft Order referred to in paragraph (1) (i) above the committee shall consider the Minister's recommendation under section 15(1) of the Act as to the procedure which should apply to it and shall report to the House any recommendation under the Act that a different procedure should apply.

(3) In its consideration of draft Orders under Part 1 of the Act the committee shall include in its consideration in each case whether provision in the draft Order—

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

(b) ~~is for the purpose of removing or reducing~~ **serves the purpose of removing or reducing** a burden, or the overall burdens, resulting directly or indirectly for any person from any legislation (in respect of a draft Order under section 1 of the Act);

(c) ~~is for the purpose of securing~~ **serves the purpose of securing** that regulatory functions are exercised so as to comply with the regulatory principles, as set out in section 2(3) of the Act (in respect of a draft Order under section 2 of the Act);

(d) **secures** ~~would secure~~ a policy objective which could not be satisfactorily secured by non-legislative means;

(e) **has** ~~would have~~ an effect which is proportionate to the policy objective;

(f) strikes a fair balance between the public interest and the interests of any person adversely affected by it;

(g) does not remove any necessary protection;

(h) does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;

(i) is not of constitutional significance;

(j) makes the law more accessible or more easily understood (in the case of provisions restating enactments);

(k) has been the subject of, and takes appropriate account of, adequate consultation;

(l) gives rise to an issue under such criteria for consideration of statutory instruments laid down in paragraph (1)(i) of Standing Order No 151 (Statutory Instruments (Joint Committee)) as are relevant;

(m) appears to be incompatible with any obligation resulting from membership of the European Union;

Provided that in the case of-

i) draft Orders to be made in accordance with section 20 of the Act, the criteria above which are not relevant to the provisions of the Order to be made under section 2(2) of the European Communities Act 1972 do not apply in relation to those provisions; **and**

ii) Subordinate Provisions Orders or drafts of such Orders, only sub-paragraph (l) applies, but in addition the committee shall so report if it comes to the opinion that the Order or draft Order should not be approved or, as the case may be, should be annulled, and may so report if it comes to the opinion that the draft of such an Order should be approved.

(4) In relation to every draft Order subject to the negative or affirmative procedure under sections 16 or 17 of the Act, the committee shall report its recommendation whether the draft Order should be made (in the case of the negative procedure) or

approved (in the case of the affirmative procedure), indicating in the case of an affirmative Order whether the recommendation was agreed –

(a) without either a division or a recommendation that the Order should stand referred to a Delegated Legislation Committee;

(b) without a division but with a recommendation that the Order should stand referred to a Delegated Legislation Committee; or

(c) after a division.

(5) In relation to every draft Order subject to the super-affirmative procedure under section 18 of the Act, the committee shall report its recommendation as to whether—

(a) the draft Order should be proceeded with unamended under section 18(3) of the Act; or

(b) a revised draft Order should be laid under section 18(7) of the Act or

(c) no statement under section 18(3) or revised draft Order under section 18(7) should be laid.

(6) In relation to every draft Order or revised draft Order subject to the super-affirmative procedure being proceeded with under section 18(3) or 18(7) of the Act, the committee shall report its recommendation whether the draft Order or revised draft Order should be approved, indicating in the case of draft Orders which it recommends should be approved whether its recommendation was agreed –

(a) without either a division or a recommendation that the Order should stand referred to a Delegated Legislation Committee;

(b) without a division but with a recommendation that the Order should stand referred to a Delegated Legislation Committee; or

(c) after a division;

and in respect of such draft Orders or revised draft Orders the committee shall consider in each case all such matters set out in paragraph (3) of this Order as are relevant and the extent to which the Minister concerned has had regard to any resolution or report of the committee or to any other representations made during the period for parliamentary consideration.

(7) It shall be an instruction to the committee considering an **unrevised draft Order under paragraph (6)** that it report not more than fifteen sitting days after the statement under section 18(3) is laid.

(8) In relation to every draft Order or revised draft Order, the committee shall report any recommendation under section 16(4) of the Act that the draft Order be not made, or sections 17(3), 18(5) or 18(9) of the Act that no further proceedings be taken in relation to the draft Order.

(9) The committee shall consist of fourteen members; and, unless the House otherwise Orders, each Member nominated to the committee shall continue to be a member of it

for the remainder of the Parliament.

(10) The committee shall have power—

(a) to send for persons, papers and records, to sit notwithstanding any adjournment of the House, to adjourn from place to place, and to report from time to time;

(b) to appoint specialist advisers either to supply information which is not readily available or to elucidate matters of complexity within the committee's order of reference; and

(c) to appoint a sub-committee, of which the quorum shall be two, which shall have power to send for persons, papers and records, to sit notwithstanding any adjournment of the House, and to adjourn from place to place.

(11) The committee and the sub-committee shall have the assistance of the Counsel to the Speaker.

(12) The committee and the sub-committee shall have power to invite Members of the House who are not members of the committee to attend meetings at which witnesses are being examined in relation to matters within paragraphs (1) (i) and (ii) and such Members may, at the discretion of the chairman, ask questions of those witnesses; but no Member not being a member of the committee shall otherwise take part in the proceedings of the committee or sub-committee, or be counted in the quorum.

~~(13) It shall be an instruction to the committee that before making any report under paragraph (1)(i) of this Standing Order it shall afford to any government department concerned an opportunity of furnishing orally or in writing to it or to the sub-committee appointed by it such explanations as the department think fit.~~

Conclusions and recommendations

1. We recommend that the draft Standing Orders be amended to provide us with the power to refer Orders for debate in Delegated Standing Committees that we consider to be of sufficient legal and political significance without having to divide or contrive a division. For draft Orders that we do not approve unanimously, we recommend that our current procedures continue and that any subsequent motion made by a Minister of the Crown to approve such draft Orders should be debated for up to one and a half hours on the floor of the House.
2. We recommend that Subordinate Provisions Orders should continue to be scrutinised in the Commons by our Committee as now and the draft Standing Orders be amended accordingly.
3. We recommend that the wording in 141(3b and 3c) be changed from the subjective to the more objective. This amendment also has the added advantage of providing a better match with the tests set out in the Act.
4. We envisage that we will always report within 15 days when there are no new second stage issues to consider, but for revised Orders we can only report as promptly as is reasonably possible. We recommend that the draft Standing Orders be clarified accordingly by amendment.
5. We recommend that the Standing Order 141(13) be deleted.
6. We recommend that the working of the LRA 2006 be reviewed within three years and that the review include a genuine validation of any costs and benefits or Regulatory Impact Assessments that are produced in support of all draft Orders; and that the Government report its findings to Parliament.
7. It is imperative therefore that the House and the Department of the Clerk are able to respond speedily to any significant increase in activity. In the first instance, we would expect to be able to draw on staff in the Scrutiny Unit to be seconded in relation to specific Orders or stages of them, so as to provide assistance to the regular staff advising the Committee.

Formal minutes

Tuesday 12 December 2006

Members present:

Andrew Miller, in the Chair

Gordon Banks
Lorely Burt

Dr Doug Naysmith
Ms Angela C Smith

The Committee deliberated.

Draft Report [Scrutiny of Regulatory Reform Orders], proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 25 read and agreed to.

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

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

Several papers were ordered to be appended to the Report.

Ordered, That the Appendices to the Report be reported to the House.

[Adjourned till a day and time to be fixed by the Chairman.]

List of written evidence

A Letter from Pat McFadden MP to the Chairman of the Regulatory Reform Committee	21
B Letter from Jim Murphy MP to the Chairman of the Regulatory Reform Committee	21
C Letter from the Chairman of the Procedure Committee to Pat McFadden MP, Parliamentary Secretary, Cabinet Office	22
D Letter from Chairman of the Regulatory Reform Committee to the Chairman of the Joint Committee on Statutory Instruments	23
E Letter from the Chairman of the Joint Committee on Statutory Instruments to the Chairman of the Regulatory Reform Committee	24

Appendix A

Letter from Pat McFadden MP, Parliamentary Secretary, Cabinet Office to the Chairman of the Regulatory Reform Committee

Legislative and Regulatory Reform Bill—amendments to the Regulatory Reform Committee Standing Orders

Following our meeting of 17 October, I am writing to seek your views on revisions to Standing Orders Nos. 18 and 141. The new Standing Orders reflect changes to the role of the Regulatory Reform Committee, and related floor of the House proceedings, necessary with the passage of the Legislative and Regulatory Reform Bill. Versions of new Standing Orders Nos. 18 and 141 are attached at Annex A.

I would like to emphasise that the attached Standing Orders are in draft form and reflect the Bill as it stands. Further amendments will be made if necessary to reflect any changes to the Bill once it has received Royal Assent.

An issue not dealt with in the drafts is the provision necessary to accommodate subordinate provisions orders made to amend existing Regulatory Reform Orders. You will be aware that the Bill preserves those aspects of the 2001 Regulatory Reform Act that allow for the continued making of subordinate provisions orders under that Act. Standing Orders will also need to provide for the continued scrutiny of such orders in the future. This is currently undertaken by the Regulatory Reform Committee.

One option to provide for this is to amend Standing Orders No. 151 to bring scrutiny of subordinate provisions orders within the remit of the Joint Committee on Statutory Instruments (JCSI). However, this is an issue on which I would be happy to listen to views. I would also be open to suggestions on an appropriate formula to allow for the Regulatory Reform Committee to continue scrutinising of subordinate provisions orders should committees consider this appropriate.

30 October 2006

Appendix B

Letter from Jim Murphy MP, Parliamentary Secretary, Cabinet Office to the Chairman of the Regulatory Reform Committee

As you know, the Legislative and Regulatory Reform Bill has potential to make a real impact on reducing burdensome regulation. This Bill is the third attempt by a government since 1994 to have an Act that can improve the way we regulate for the public sector, businesses, charities and the voluntary sector. We must get this third attempt right if we are not to put our shared ambitions on the better regulation agenda at risk.

As I've mentioned before, the Regulatory Reform Committee and its equivalent in the Lords have played an important role in constructively scrutinising the proposals in the Bill. And I would like to thank you for the important contribution you made during the Bill's committee stage.

The Bill's passage so far has served to confirm the general consensus that the 2001 Act is not up to the job of delivering the action on red tape that businesses, public servants and voluntary workers tell me they need. That's because the 2001 Act is too narrowly defined and too complicated to use. The new Legislative and Regulatory Reform Bill aims to deal with these shortcomings.

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

Let me be quite clear, safeguards already in the Bill ensure that the order-making power cannot be used to remove necessary protections, rights or freedoms. And I have already made a commitment to give Parliament a statutory veto on the face of the Bill. In addition, I am now looking into making the power more clearly focused on delivering better regulation objectives. But I am determined that the power is framed in such a way that we still are able to deliver real change, including the initiatives that departments will be proposing in their forthcoming simplification plans and the benefits of our ambitious admin burdens reduction programme. There is real determination in Government to deliver on these commitments.

The types of initiative we would want to use the Bill for include the simplification and consolidation of legislation so it is easier for business, the public and voluntary sectors to work with; ensuring that inspection is risk-based to reduce regulatory burdens; the streamlining of consent regimes to make them more transparent; the reduction of administrative burdens and the exemption in certain key instances of SMEs, charities and others from burdensome regulation.

I hope to bring forward appropriate amendments by Commons Report Stage to achieve these aims.

All those who want to see real action taken to lighten the regulatory load on business, our public services and the voluntary sector will be reassured by focussing the order making power on better regulation objectives. There will now be a clear expectation from businesses, the public sector and voluntary workers that this Bill receives broad support.

12 April 2006

Appendix C

Letter from the Chairman of the Procedure Committee to Pat McFadden MP, Parliamentary Secretary, Cabinet Office

Thank you for your letter of 30 October asking for the views of my Committee on your proposed changes to Standing Orders Nos. 18 and 141. We have now had a chance to discuss them and the views expressed in this letter are those of the Committee as a whole.

We are generally content that the procedures substantially follow those for Regulatory Reform Orders under the 2001 Act. In our report in March this year we recommended that the Regulatory Reform Committee should have a formal power to refer a draft Order to another committee. Since then the scope of the Order making power has been substantially narrowed and we are content that that recommendation has not been included at this stage. If the number of draft Orders under the new Act proves to be significantly greater than under the 2001 Act, or their effect more far-reaching, we may wish to return to this issue.

There are, however, two areas where we have reservations. Both relate principally to Standing Order No. 18.

The first is that your proposed revisions have reduced the opportunities for debate on the floor of the House compared with the existing procedures. We do not believe that it is acceptable that, where the Regulatory Reform Committee has agreed to a draft Order subject to the affirmative or super-affirmative procedure only after a division, the debate on that draft Order should no longer be taken on the floor of the House. These Orders are by definition amendments to primary legislation that could only otherwise be made by an Act of Parliament. It does not seem unreasonable that where they are sufficiently controversial to have led to a division in the Committee, a debate on the floor of the House should be triggered.

We also continue to support the recommendation of the Regulatory Reform Committee that it should be able to ensure debate of draft Orders which it considers to merit wider parliamentary consideration. We would be content that such debates should normally take place in a Delegated Legislation Committee, although there might be occasions when it would be appropriate for them to be taken on the floor. In this respect our proposal would give to the Regulatory Reform Committee an analogous power to recommend debate to that currently held by the European Scrutiny Committee. Such a power would also have the practical benefit of discouraging the Regulatory Reform Committee from artificially dividing on draft Orders which were not in fact opposed but which the Committee believed should be debated.

Our second reservation is over the proposed procedure in Standing Order No. 18 for the overturning by the House of the veto on further proceedings which has been statutorily provided to the Regulatory Reform Committee. There can be no doubt that the House has the power and the right to overturn such a veto, but we do not see the need to provide a special and accelerated procedure by which this can be done. As we understand it the veto is intended to be used only in exceptional circumstances. It is in that sense a sort of reserve power held by the Committee to prevent abuse of the procedures. We also understand that the Government has undertaken that it will not seek to overturn a statutory veto. It therefore seems to us that it is unnecessary to make this special provision, and that to do so risks sending the wrong signals about the Government's intentions. It may be hard to argue convincingly that you have no intention of overturning a veto when you have introduced a new provision specifically to enable you to do it.

We look forward to receiving your response to these points. I would be very willing to discuss these issues further with you, or to suggest specific amendments to the draft Standing Orders if that would be helpful.

7 December 2006

Appendix D

Letter from Chairman of the Regulatory Reform Committee to the Chairman of the Joint Committee on Statutory Instruments

As you know, the Legislative and Regulatory Reform Act (LRRRA), which will come into effect on 8 January, has some implications for our Order of Reference (currently Standing Order No. 141) and Standing Order No. 18, which governs the consideration of draft Orders made under that Act and under its predecessor, the Regulatory Reform Act (RRA) 2001.

My Committee is currently considering Government proposals for revising these Standing Orders. In preparing our response to the Government, we thought it would be useful to receive your comments on two specific issues that have potential implications for your Committee.

First, we would welcome your views on the Government's proposal that provisions within an Regulatory Reform Order (RRO) that arise from s2(2) of the European Communities Act 1972 will in future be scrutinised by RRC in the Commons and the Delegated Powers and Regulatory Reform Committee (DPRRC)

in the Upper House, rather than have those provisions within an RRO scrutinised separately by Joint Committee on Statutory Instruments.

Second, we would also welcome your views on the proposal that the responsibility for scrutinising Subordinate Provisions Orders that arise from RROs made under the RRA 2001 be transferred to your Committee and the Merits Committee in the Lords rather than continue to have them examined by RRC and the DPRRC as now.

25 November 2006

Appendix E

Letter from the Chairman of the Joint Committee on Statutory Instruments to the Chairman of the Regulatory Reform Committee

Thank you for your letter (dated 25 November) in which you sought the views of my Committee on the Government's proposals to change the way that certain instruments are scrutinised in the wake of the Legislative and Regulatory Reform Act (LRA) being passed.

We considered two possible changes to our Standing Orders. First, the Government's proposal that provisions within a Regulatory Reform Order (RRO) that arise from s2(2) of the European Communities Act 1972 be scrutinised by the Regulatory Reform Committee (RRC) and the Delegated Powers and Regulatory Reform Committee (DPRRC) in the Commons and Upper House respectively as part of their scrutiny of the entire RRO. Second, the proposal that Subordinate Provisions Orders be scrutinised by us and Merits Committee in the Lords; or whether such Orders should continue to be scrutinised by the RRC and the DPRRC Committees as now.

We considered both proposals carefully at our meeting of 29 November and concluded the following. As regards the first proposal, we support this on the grounds that the RRC and DPRRC will be able to apply a comparable level of parliamentary scrutiny as is currently exercised by us and the arrangement seems to be wholly sensible and raises no significant issues of policy or scrutiny.

As regards the second proposal, we are not content with this. We are mindful that RRC, unlike JCSI, is not limited to scrutinising only the technical qualities of Orders: it can also make a recommendation that the Order be annulled (negative) or not approved (affirmative) as the case may be. In short, RRC can express an opinion on the desirability or merits of such Orders. The transfer of Subordinate Provisions Orders to JCSI and our sister Committee (Merits) in the Lords would mean that these Orders would be scrutinised for their technical qualities alone in the Commons and that this would amount to a significant loss of power to express an opinion on aspects other than the technical qualities of such Orders. This loss of power to the House is something that we would not welcome. Our Committee would also not welcome having this power transferred to it. In short, our view is that the scrutiny of Subordinate Provisions Orders should continue to be discharged in the Commons by the RRC as now.

I hope this is useful.

5 December 2006

Reports from the Regulatory Reform Committee in the last Session of Parliament

Session 2005-06

First	Proposal for the Regulatory Reform (Forestry) Order 2006	729
First Special	Legislative and Regulatory Reform Bill	878
Second	Proposal for the Regulatory Reform (Public Service Vehicles) Order 2006	879
Third	Draft Regulatory Reform (Forestry) Order 2006	880
Second Special	Government Response to the Committee's First Special Report of Session 2005-06: Legislative and Regulatory Reform Bill	1004
Fourth	Regulatory Reform (Fire Safety) Subordinate Provisions Order 2006	1005
Fifth	Proposal for the Regulatory Reform (Registered Designs) Order 2006	1142
Sixth	Proposal for the Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006	1309
Seventh	Draft Regulatory Reform (Registered Designs) Order 2006	1349
Eighth	Draft Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006	1555