These notes refer to the Regulatory Reform Act 2001 (c.6) which received Royal Assent on 10th April 2001

REGULATORY REFORM ACT 2001

EXPLANATORY NOTES

ANNEX L:: COMPLIANCE WITH HUMAN RIGHTS OBLIGATIONS

Note: paragraph 73 of the Explanatory Notes refers.

Letter from Lord Falconer of Thoroton QC, Minister of State and Graham Stringer MP, Parliamentary Secretary, Cabinet Office to the Chairman of the Joint Committee on Human Rights

"REGULATORY REFORM BILL—HUMAN RIGHTS COMPLIANCE

As the two Ministers responsible for the Bill in the Lords and Commons, we thought it most appropriate to answer jointly.

Let us start by congratulating you on your appointment to the Chair of this new and important Joint Committee. It will play a valuable role in overseeing the application of the Human Rights Act and will bolster Parliament's scrutiny of legislative proposals. We welcome your interest in the Regulatory Reform Bill.

You ask in the letter for information on the Bill's compliance with the Human Rights Act 1998 and with human rights more generally. In responding, we hope you will find it useful if we first set out the general approach taken by the Bill, before dealing specifically with the questions you raise. The Explanatory Notes, as attached, go into greater detail on the thinking behind the Bill.

IMPLICATIONS OF HUMAN RIGHTS LEGISLATION

As you know, the effect of the Human Rights Act is that Ministers are under an over-arching duty to act in compliance with its provisions. That injunction is of central importance to any consideration of the potential exercise of the order-making power. Given that the Regulatory Reform Bill contains nothing but enabling provisions, it is sufficient that the powers in the Bill are capable of being exercised in a way that is compliant, since it would be contrary to the HRA to do otherwise. The corollary of this is key: when signing a section 19(1)(a) statement in relation to enabling powers Ministers confirm that they will be legally obliged to exercise those powers in accordance with the 1998 Act. That point will also be addressed in the statement on compatibility that the Minister will make to Parliament in relation to each draft order. It follows that, legally, so long as it is capable of being exercised compatibly, there is no need for any further controls on a legislative power.

The Human Rights Act has a further implication for RROs. We set out in Annex D [as published] of the Explanatory Notes a list of measures that we propose taking forward by way of regulatory reform order. We want by way of this Bill to permit the reform of entire regulatory regimes, going beyond the limited reforms currently possible under the Deregulation and Contracting Out Act 1994. Of these, we envisage that the larger reforms—such as the reform of fire safety legislation—would involve the repeal of the relevant Acts and their replacement by a single order. On the other hand, some of the smaller reforms—such as New Years' Eve licensing deregulation—would be limited to the amendment of existing legislation, as is possible under the 1994 Act. Section 21 of the 1998 Act defines primary legislation as including amendments made by secondary legislation. The consequences of this definition are two-fold:

— in the case of an *"repeal and replacement" RRO,* the order would be treated under the Human Rights Act as secondary legislation. This means that an RRO could be quashed by the Courts. The scope for challenge under the 1998 Act is exactly the same as for any other secondary legislation. Any class of statutory instrument, whether affirmative, negative, or in the case of the bill, super-affirmative, can be attacked in the courts and struck down if incompatible. So the fact that the powers are very wide is irrelevant. There are numerous legislative powers that, on their face, are capable of being exercised in ways that would be incompatible but are legally constrained by the over-arching principle outlined above;

— in the case of an "amendment only" RRO, the order could not be struck down to the extent that it amends primary legislation. It could, however, still be the subject of a declaration of incompatibility by the Courts under section 4 of the 1998 Act, and the Government would

have to consider the need for remedial action. After the order was made the court could do anything else which it had power to do under section 8, including awarding damages where relevant. So the power of challenge goes wider than simple judicial review.

But, as a vehicle for reform, it is also worth noting that an RRO could, *inter alia*, address a piece of legislation's non-compliance with the ECHR, provided the reform proposal met the criteria and safeguards in the Bill.

It is against this background that Mo Mowlam signed the statement under section 19(1)(a) of the 1998 Act in respect of the Bill.

PROVISIONS IN THE BILL

There are two main order-making powers in the Bill, with which we will deal in turn.

First, the regulatory reform order-making power in clauses 1-8.

These clauses of the Bill provide Ministers with a power to reform primary legislation by order where burdens are imposed on those carrying on activities.

As an enabling power, the regulatory reform order-making provisions would not in themselves affect any rights whatsoever, and are therefore compatible with Convention Rights. Issues of compatibility only arise in the application of the power in particular cases.

As set out in the Explanatory Notes, each proposed regulatory reform order will also be accompanied by a statement of the Minister's views on its compatibility with the Convention rights. This is in line with the commitment made by Lord Williams of Mostyn (House of Lords *Hansard* 2 November 1999, col 738) that Ministers would always inform the House whether they are satisfied that secondary legislation subject to the affirmative procedure is compatible. The effect of this undertaking will be to require Ministers to address fully the human rights implications of any proposal for an RRO before tabling it.

We shall return to the safeguards in place on the face of the Bill when we come to discuss question (a) in your letter. Before doing so, we would like to stress that the safeguards in the Bill are aimed at assisting compliance with the requirements of the 1998 Act rather than at preventing a breach. Paradoxically, it may be easier to exercise a big and general enabling power in compliance with the ECHR. An example would be the implementing power in section 2 of the European Communities Act 1972 which is often used to introduce major new legislation and which does not feature in itself the sort of robust safeguards found in the Bill. Problems should only arise where the power is such that the Minister cannot act in accordance with the Convention—for example, if an Act gave power to deprive somebody of their rights but did not enable provision to be made for an appeal, then the power itself would be incompatible. We are not in that position.

We would also like to address the subjective nature of the tests. This received a great deal of attention during the Lords stages of the Bill. The effect of the stress the Bill places on the Minister's opinion is to grant Parliament the determinative role in the scrutiny process. Under the Bill, the starting point is for the Minister to reach an opinion. That opinion is then tested by thorough consultation. When the matter comes before the Committees, they will test the Minister's opinion and they will decide whether they agree that his opinion is right. The Minister would still need to be of the "opinion" when finally making the order. That opinion would also —theoretically—be subject to the "Wednesbury reasonableness" test (ie all powers and duties must be exercised reasonably), in the unlikely event that the matter ever came before the Courts for judicial review.

To convert these safeguards into objective tests by removing the Minister's opinion from the Bill would effectively mean that the power to decide would be for the courts, not for Parliament. We are firmly of the view that this would not be appropriate since the Bill provides for a Parliamentary process. Parliament should remain responsible for scrutiny through its Committees and for the subsequent approval of reform proposals and the Minister should be accountable to Parliament in that process. We believe that this Parliamentary control is equally

appropriate, within the legal constraints, for compatibility issues. It is positively desirable, as the super-affirmative procedure allows, for Parliament to consider whether they agree that, for example, the Minister has got the Article 8 balance right to justify a draft order.

Second, the reserve power to apply a code of enforcement practice in clauses 9-11.

This is a reserve power to apply a code of practice to enforcement bodies where there is scope for improvement in their enforcement practices. As an enabling power, the enforcement code of practice order-making provisions would not in themselves affect any rights whatsoever, and are therefore compatible with Convention Rights. Any proposals to make a code would be subject to public consultation, and the Minister proposing a code would be responsible for checking compatibility with the ECHR at the time.

THE COMMITTEE'S QUESTIONS

We would like to turn now to the questions you raise on the Bill.

Question (a)—steps taken to ensure that orders are compatible with Convention rights

The power contained in the Bill to reform legislation is wide, and deliberately so. We want to be able to use the power to enact powerful and important reform that might not otherwise reach the statute book. It is worth noting that, as with deregulation orders, proposals will have a relatively long gestation period and will be tabled fully formed for first stage scrutiny, albeit "in the form of a draft". It would not be possible, for instance, for a Minister to table a skeleton order. This would reduce the risk—which may arise with Bills—of unforeseen consequences affecting Convention rights.

That said, however, the Bill contains very strict safeguards. It is worth repeating that the safeguards assist Ministers in complying with the requirements of the 1998 Act, rather than in themselves preventing a breach. The safeguards must be applied with the Convention in mind. This is not just practice—it is the effect of section 3 of the 1998 Act.

The application of the order-making power in particular cases is governed by a set of safeguards. The first two tests apply to all orders:

— *necessary protection:* an order cannot be made unless the Minister is of the opinion that it would maintain any *protections* that the Minister considers to be necessary. As set out in the Explanatory Notes, this test is reproduced from section 1(1)(b) of the Deregulation and Contracting Out Act 1994 (DCOA), and has been applied by the Deregulation Committees widely and robustly. No order can be made unless the Minister is of the opinion that it would maintain any protections that the Minister considers to be necessary. Such protection relates to the checks and balances associated with a particular regulatory regime. The protection does not have to be expressly provided for in statute —an order may replace a protection that was statutory in origin with something non-statutory provided that the Committees could be convinced that there is a guarantee in practice that doing so would maintain necessary protection for the future. They have accepted in principle that protection can be provided in other, non-statutory, forms such as British or international standards or Codes of Practice. It is also worth noting that, under the Bill, the protection also does not have to be for the purposes originally intended by Parliament. For instance, the Sunday trading laws were passed for reasons of religious observance whereas now they are just as likely to be seen as providing protection for employees. The concept of necessary protection can relate to economic, health and safety protection and the protection of civil liberties. It can also extend to protection for the environment and national heritage. Not all protection need be seen as necessary. For example, the law forbidding 16 and 17-year olds from working in the bar areas of public houses was amended in 1997 using a deregulation order. The legal protection of young people in these circumstances was no longer deemed necessary, although the Department involved had to provide compelling evidence to support this view (see paragraph 27 in Annex A of the Explanatory Notes). The simple fact of the matter is that necessary protections have to be maintained by whatever means. The Minister would, of course,

need to consult thoroughly on that element of the proposal and to justify the proposal in the clause 6 document;

— *rights and freedoms:* an order cannot be made if the Minister is of the opinion that the proposed order would "prevent any person from continuing to exercise *any right or freedom* which he might *reasonably* expect to continue to enjoy". This new test was suggested when the Bill was still in draft by the Delegated Powers and Deregulation Committee, and was welcomed by the Government. As set out in the Explanatory Notes, this safeguard recognises that there are certain rights that it would not be fair to take away from people under these procedures, and has certain parallels with the concept of legitimate expectations, but goes further than the minimum human rights guarantees. It is an additional safeguard, intended to form a stiff test for potential orders, in particular those which would remove or reduce burdens on the public sector. Ministers bringing forward orders will need to have consulted thoroughly on the relevant issues and to have given careful consideration to what constitutes "reasonable expectation", as will the scrutiny Committees.

The Bill also sets out in clause 1 that any burden, whether re-stated or newly imposed, has to be *proportionate* to the benefit that results from its retention or creation. It should be noted that, unlike the tests of necessary protection and rights and freedoms, this objective applies to the burdens themselves, rather than to the order itself. This objective accords with the principles of good regulation, and is now a concept with which the UK legal system is familiar. The decision about what is proportionate will always depend on the individual circumstances of the case. For example, in rationalising a licensing system it might not be considered proportionate to require people who did not previously have to have a licence to obtain one. It might be considered more proportionate (and therefore more appropriate) to set up a new system of negative licensing, class (rather than individual) licensing, or perhaps a registration system instead. Whatever the Minister decides to promote in the proposed order, he will have to explain why in the explanatory document required under clause 6. This objective considers the effect of the burden on the individual, whereas the *fair balance test* (see below) requires the Minister to consider the relationship between the public interest and those affected by the imposition of the burden.

In addition to the objective of proportionality in clause 1, there are separate and additional safeguards that apply where an order would impose a burden, although every order must contain provision to remove or reduce burdens;

— *fair balance:* where burdens are to be *imposed* by order as part of a legislative reform, the Minister must be of the opinion that "the provisions of the order, taken as a whole, strike a fair balance between the public interest and the interests of the persons affected by the burden being created." The Minister may, for example, feel that there is a need to maintain or improve the protection of consumers afforded by a licensing regime at the same time as reducing the overall burden of the regime. This might be achieved by imposing a less onerous licensing requirement on a greater number of licensees. Whereas the "rights and freedoms" test looks at the rights of the individual, the "fair balance" safeguard considers the relationship between the individual and society. Whatever the Minister decides, he must explain his reasoning in the document he lays before Parliament under clause 6; and

— *desirability:* this test, which also applies to orders that impose burdens, states that the Minister must be of the opinion that it is desirable to make the order either in terms of the reduction of other burdens or in terms of the benefits for persons that are currently affected by the burdens. This means that the Minister must take into account either the reduction in burdens (which, under clause 1(3), must form part of any order) or other benefits for those currently affected by the burdens. Such benefits might include increased legal clarity, less administrative complexity, or less easily defined benefits such as that which would accrue to Welsh people in England if, as is proposed, they were relieved of the burden of not being able to register births or deaths in Welsh. The factors must be significant enough to make the order as a whole desirable.

It is important to note that these tests are cumulative in nature. They are not optional—for example, the Minister would not be able to proceed if he was able to demonstrate that a burden would be proportionate but not that it struck a fair balance between the rights of the individuals affected by the burden and the public interest. The effect of the safeguards is to require the Minister to prove his case in relation to each proposed order.

Clause 3 also sets out further express limitations on the order-making power as follows:

— *creation of criminal offences* (clauses 3(3) and (4)): while an order can create criminal offences, which is needed if the power is to be capable of addressing whole regulatory regimes, the power is capped at a maximum of two years' imprisonment for indictable offences and six months' imprisonment for summary offences. These maxima are nevertheless relatively steep offences for regulatory regimes. If a policy Department were to propose to reform burdensome legislation that contained more severe penalties, it would be obliged to reduce them to the level permitted under clause 3; and

— *entry, search, seizure and compelling of giving of evidence:* while an order can contain such provisions, it can only do so to the extent that they are applied in similar circumstances as in the legislation under reform. If such provision were to be re-enacted by RRO, the proposal would be subject to the proportionality test.

But we do not rely simply on these safeguards. The Bill requires thorough and prior public consultation for each proposal. The nature of the consultation required—and the extent to which it is policed by the scrutiny committees—is detailed in the Explanatory Notes. That consultation process informs the explanatory document that, under clause 6, must accompany each proposal when laid in draft for scrutiny. Each draft order then, undergoes the rigorous Parliamentary scrutiny afforded by the super-affirmative procedure, which the Delegated Powers and Deregulation Committee described in its Second Report, 2000-01 Session, as follows: "Far from cutting out the opportunity for parliamentarians to go through legislation line by line we believe that the Deregulation Committee procedure has enhanced detailed parliamentary scrutiny of proposals which might otherwise either not have seen the light of parliamentary day or might have received only the most cursory scrutiny.".

Of course, no order could be enacted unless approved by each House of Parliament.

Question (b)—ensuring that the removal of a burden does not deprive a third party of their Convention rights

As you state in paragraph 2 of your letter, the definition of "burden" in the Bill is a wide one. Again, we want the power to be used in a way that removes unnecessary burdens resulting from over complex, outdated and overburdensome legislation. However, we are not relying on the safeguards to prevent third parties being deprived of their rights—this is because, as mentioned above, the safeguards assist in achieving compliance with the requirements of the 1998 Act. The effect of section 3 of the 1998 Act is to require that the safeguards be applied with the Convention in mind.

Firstly, no order may remove *necessary protection.* It is inconceivable that any protection afforded by the Convention could be seen as "unnecessary". Indeed, if a protection is not otherwise necessary, it becomes necessary if it is for Convention purposes—and this logic also applies to the other safeguards.

Secondly, no order may prevent any person from continuing to exercise *any right or freedom* that they might reasonably expect to continue to exercise. Again, any individual or organisation could claim rightly that a right or freedom afforded to them by the Convention was one that they could "reasonably expect to continue to exercise". Any order that attempt to remove such a right or freedom would quite simply not be within the powers of the Bill.

In this context, a crucial aspect of these two tests is that they do not apply solely to the people at whom the order is targeted. The use in both clause 3(1)(a) and 3(1)(b) of the word "any" makes clear that no third party could be deprived of any protection, rights or freedoms.

You also ask what representations we have received in connection with this Bill in relation to human rights issues. As you will be aware, this Bill has undergone extensive pre-legislative scrutiny and, to date, we have received *no* representations on these issues.

We hope you will agree that, given that the safeguards assist with achieving compliance with ECHR, there is clear and determinate delimitation of the regulatory reform power. We would, of course, be happy to provide the Committee with any further information it needs. We would be interested in your views as to whether you saw your Committee becoming involved in the scrutiny of individual proposals for regulatory reform.

Charles Falconer and Graham Stringer

March 2001