

*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

INTRODUCTION

1. These explanatory notes relate to the Regulatory Reform Act 2001. They have been prepared by the Cabinet Office in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

SUMMARY

3. The main provision of the Regulatory Reform Act removes some of the barriers to wider application of the deregulation order-making power under sections 1-4 of the Deregulation and Contracting Out Act 1994 (the 1994 Act). The new order-making power in the Act is wide enough, but no wider than necessary, to deal with regulatory reform measures which the Government wishes to achieve. In parallel with the widening of the power, the Act adds to the tests and safeguards governing its use.
4. The Act also makes provision to replace section 5 of the 1994 Act, which is concerned with enforcement of regulations, replacing a little-used procedure with a reserve power for Ministers to set out a code of good practice in enforcement.

PRE-LEGISLATIVE SCRUTINY

5. This policy was the subject of a public consultation document published by the Cabinet Office on 2 March 1999. Both the Lords Delegated Powers and Deregulation Committee and the Commons Deregulation Committee reported on the proposals in their 14th and First Special Reports of the 1998-99 Session respectively (HL 55 and HC 324). The Government's formal responses to the two Committees' reports were also published in the Lords Committee's 28th Report of the 1998-99 Session (HL 111) and the Commons' Committee's First Special Report of the 1999-00 Session (HC 177).
6. The Cabinet Office published a consultation paper on replacing the enforcement provisions in the 1994 Act on 28 September 1999. The Lords Delegated Powers and Deregulation Committee commented briefly on the proposal in its 28th Report of 1998-99 (HL 111).
7. Both Committees scrutinised the draft Bill following its publication in a Command Paper (Cm 4713) in April 2000. Evidence was taken from Cabinet Office Ministers, Lord Falconer and Graham Stringer. The Lords Committee reported on the draft Bill in its 15th, 24th and 37th Reports of the 1999-2000 session (HL 61, 86 and 130), and the Commons Committee in its Second and Third Special Reports of the 1999-2000 Session (HC 488 and 705). No change was made to the Bill following its publication in draft and prior to its introduction in the House of Lords on 7 December 2000. The Lords Committee then reported on the Bill's proposals for delegated legislation in its 2nd Report (HL 8) of the 2000/01 Session.

8. The Lords Committee also reported on the amendments made to the Bill by the House of Lords in its 10th Report (HL 38). While the Bill was before the Commons, the Commons Deregulation Committee reported on it in its 1st Special Report (HC 328) of the 2000/01 Session, in which it also set out its proposals for amending the relevant standing orders (see **Annex A**). Finally, the Lords Committee set out its recommendations for changes to standing orders in its 26th Report (HL 83).

BACKGROUND

The previous deregulation order-making power

9. The deregulation order-making power under the 1994 Act was used 48 times to remove burdens from business and individuals which might not otherwise have received Parliamentary time. Deregulation orders included, for example, removing the need for 3-yearly re-authorisation of deductions of union subscriptions from salary; permitting bookings at registry offices up to 12 months in advance instead of three; and relaxing the restrictions on opening hours of licensed premises over Millennium Eve. A full list of deregulation orders made under the 1994 Act is at **Annex B**.

Transition to the 2001 Act

10. When the 2001 Act was passed, there were four proposals for deregulation orders before Parliament for scrutiny, as set out at the end of **Annex B**. The Act provides in section 12 that Parliament can complete its scrutiny of any proposals for deregulation orders that have been laid before it.
11. As provided for under section 5(4), the Government also published six consultation documents on prospective use of the regulatory reform order-making power before the Act received Royal Assent. They are as follows:
- Business Tenancies Legislation In England And Wales: The Government's Proposals For Reform¹;
 - Gaming machines: methods of payment - a consultation paper²;
 - Letting of Business Premises, Landlord and Tenant Act 1954 Section 57 - Consultation Paper³;
 - Consultation on Licensing Hours for New Year's Eve 2001 and during Her Majesty's Golden Jubilee in June 2002⁴;
 - Reform of the Housing Grants, Construction and Regeneration Act 1996, Local Government and Housing Act 1989 and Housing Act 1985 - a consultation paper⁵; and
 - Removing the 20 partner limit: a consultation document⁶.
12. After Royal Assent and as at publication of these notes a further three consultation documents have been published:
- Voluntary Aided (VA) Schools in England: Proposals for Governing Body and Local Education Authority Financial Liabilities and Funding for Premises.⁷

1 <http://www.planning.detr.gov.uk/consult/btlewgrp/index.htm>

2 <http://www.homeoffice.gov.uk/ccpd/gamcons.htm>

3 <http://www.planning.detr.gov.uk/consult/lbpltas/index.htm>

4 <http://www.homeoffice.gov.uk/ccpd/llyjcon.htm>

5 <http://www.housing.detr.gov.uk/information/consult/pshr/index.htm>

6 <http://www.dti.gov.uk/cld/current.htm>

7 <http://www.dfes.gov.uk/consultations/va/74.doc>

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- Changes to Invalid Care Allowance: Amending Section 70 of the Social Security Contributions and Benefits Act 1992⁸
- Amending the Vaccine Damage Payments Act 1979⁹

Order-making process

13. The order-making process for regulatory reform orders is based on, and is very similar to, the process for deregulation orders. Orders are subject to thorough public consultation followed by detailed two-stage scrutiny by the scrutiny committees, currently the Deregulation and Regulatory Reform Committee in the House of Commons and the Delegated Powers and Regulatory Reform Committee in the House of Lords.
14. The special Parliamentary procedure which orders will undergo (sometimes called the “super-affirmative” procedure, a term first coined by the House of Commons Procedure Committee in its 1995 Report on Delegated Legislation (HC 152)) affords a greater degree of Parliamentary scrutiny than that which ordinary affirmative resolution orders receive. First, the Minister lays his regulatory reform proposal before Parliament “in the form of” a draft order together with a full explanatory document. Following the 60 day period of Parliamentary consideration, during which time the proposal is referred automatically and simultaneously to the Committees appointed by Parliament for the purpose, the Committees make their first report to their respective Houses. If the reports are favourable, the next stage is for the Minister formally to lay a draft order in each House, along with an explanation of any changes made compared to the earlier proposal. If the Minister is minded to accept any changes that are proposed to the draft order by the Committees or others between this stage and the final vote on the order, he must formally take up the draft order he has laid and replace it with another which incorporates the changes.
15. The ability to make changes (minor or otherwise) to the draft order while it is being scrutinised and in response to the scrutiny is a key feature of the order-making power, which is not available to statutory instruments dealt with in the usual way. Ministers in charge of past deregulation orders have on several occasions taken the opportunity to change their draft order in line with recommendations from the Committees. On no occasion did any Minister ignore an adverse report on a proposed deregulation order from either Committee; the proposed order was always re-cast or withdrawn accordingly. The Government intends to continue this practice in its use of regulatory reform orders, and Ministers re-affirmed this intention on a number of occasions during debate on the Bill (see **Annex C**).
16. The final procedural stages for Parliamentary scrutiny of draft regulatory reform orders are set out in Standing Orders (reproduced at **Annex A**). The Commons Committee produces a report on the draft order within 15 days. The Lords Committee has no set time period but usually reports within the same time period. Both Houses then consider the relevant Committee report on the draft order (this is the main feature that distinguishes this form of Parliamentary consideration as “super-affirmative”).
17. The procedure leading up to the final vote on the order differs in the two Houses:
 - In the **Commons**, the final procedural stages for draft orders depend on the nature of the report of the Deregulation and Regulatory Reform Committee, and are set out in House of Commons Standing Order No 18 (Consideration of deregulation orders, etc), as reproduced at **Annex A**. This requires that no motion to approve a draft order shall be made in cases where the Committee has reported that the draft order should not be approved “unless the House has previously resolved to disagree with the Committee’s report.” If Committee members agreed without a

⁸ <http://www.dss.gov.uk/consultations/consult/2001/invcare/invcare.pdf>

⁹ <http://www.dss.gov.uk/consultations/consult/2001/amvac/amvac.pdf>

division that the draft order should be approved, the Motion to approve it is put to the House forthwith. If they voted to approve the draft order following a division of the Committee, there is a debate on the draft order lasting a maximum of one and a half hours, after which the Motion to approve the draft order is put. If the Committee recommended that the order should not be approved, and the Minister still wishes to pursue the order, he is faced with two options: either he may take up the draft order and replace it with an amended draft, or he may table a Motion to disagree with the Committee report. The latter has never occurred in proceedings on a deregulation order. If it were to happen, the debate on the Minister's Motion, which would be amendable, would last a maximum of 3 hours. If the House supported the Minister's Motion, a Motion to approve the draft order would be put forthwith.

- In the **Lords**, following the publication of the Committee's second report, the Minister tables a Motion that the House should approve the draft order. There is also the opportunity for a debate, if any peer wishes it, on an accompanying motion at the same time as the motion to approve a draft order. The companion motion is moved first and can be amended and voted on. There is a Government undertaking that, in the event of a motion hostile to a draft deregulation order being agreed to by that House, the motion for the draft order would not be moved (House of Lords Hansard, 20 October 1994, col. 352). This commitment was repeated during the Lords Committee stage (see **Annex C**).

Aspects of the Regulatory Reform Order-making power

18. The deregulation order-making power was limited in its scope. It applied only to legislation enacted up to and including the 1993/94 Session, and was mostly used for small items. The Regulatory Reform Act extends the power so that it can be used more widely. The Government published illustrative lists of the measures that it wishes to achieve by way of regulatory reform order, as set out at **Annex D**. The power is sufficiently wide, but no wider than necessary, to achieve such regulatory reforms.
19. Orders under the Act, which are called regulatory reform orders, are capable of:
 - making and re-enacting statutory provision – the order can amend or repeal statutory provisions, it can replace provisions with a restatement of the law, or it can modify or replace them with new provision;
 - imposing additional burdens where necessary, provided that they are proportionate, that the order strikes a fair balance between the public interest and the interests of persons affected by any such burdens, that the order also removes or reduces other burdens and that the extent to which other burdens are removed or reduced or there are other beneficial effects makes it desirable to make the order;
 - removing inconsistencies and anomalies in legislation, provided the order also removes or reduces other burdens;
 - dealing with burdensome situations caused by a lack of statutory provision to do something;
 - applying to legislation passed after the Act if it is at least two years old when the order is made and has not been amended in substance during the last two years;
 - relieving burdens from anyone, including Ministers and government departments but not where only they would benefit; and
 - allowing administrative and minor detail to be further amended by subordinate provisions orders, subject to either negative or affirmative resolution procedure.
20. The test of maintaining necessary protection is carried over from the 1994 Act and supplemented by an additional test that no order should prevent anyone from exercising an existing right or freedom which they might reasonably expect to continue to exercise

(the “reasonable expectations” test). The Act also requires that any burdens imposed by an order must be proportionate to the benefits expected from them. In addition to this objective of proportionality in section 1, two further stringent tests (fair balance and desirability) apply if an order would increase or impose a burden. The requirements for extensive public consultation and thorough scrutiny by two Parliamentary Committees remain, but Ministers bringing forward regulatory reform orders are required to present more explanatory information to Parliament than they did with deregulation orders, to reflect the wider powers and additional safeguards.

21. More generally, from January 2001, the Government has applied a Code of Practice to all its written consultation exercises under which, as a general rule, a minimum of 12 weeks should be allowed for consultation (the consultation period should only be for less than 12 weeks in exceptional circumstances and, where the period is less than twelve weeks, the document should state Ministers’ reasons for the restriction, and what special measures have been taken to ensure that consultation is nevertheless as effective as possible). The Code has been issued by the Cabinet Office and is available on line¹⁰, and further advice on best practice is also available on line¹¹. In addition to publication on the policy Department’s own website:
 - all consultation documents on proposals for regulatory reform orders will be published on the Cabinet Office website¹²; and
 - all consultation documents, including those on proposals for regulatory reform, will be published on the Internet Register at UKOnline¹³.
22. The importance of full and thorough consultation was stressed during debate in both Houses. The Government has issued advice for Departments on the particular requirements of consultation on proposals for regulatory reform orders, as set out at **Annex E**.
23. These cumulative procedural and legal safeguards are illustrated at **Annex F**.

The policy on enforcement

The Enforcement Concordat

24. Following the 1997 election, the Government decided not to pursue the section 5 procedures in the 1994 Act but to adopt a new approach based on co-operation between enforcers and those subject to enforcement. Representatives of business, the voluntary sector, the enforcement community and consumer groups were closely involved in the development of the Enforcement Concordat. The Concordat is a non-statutory code that describes for businesses and others what they can expect from enforcement officers. Central and local enforcement bodies commit themselves voluntarily to its principles and procedures. The full text of the Concordat is at **Annex G**.
25. The principles can be summarised as follows:
 - standards – service standards that business can expect from local authority enforcers will be published annually with performance against them;
 - openness – information will be given in plain language and advice will be disseminated widely;
 - helpfulness – staff will work on the basis that prevention is better than cure;
 - complaints procedures – well-publicised and timely complaints procedures will exist;

10 <http://www.servicefirst.gov.uk/2000/consult/code/ConsultationCode.htm>

11 <http://www.consultation.gov.uk>

12 <http://www.cabinet-office.gov.uk/regulation/act/condocs.htm>

13 ¹³ <http://www.ukonline.gov.uk/online/citizenspace/default.asp>

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- proportionality – any action required will be proportionate to the risks; and
 - consistency – arrangements will be in place to ensure that different enforcers treat businesses in the same way.
26. The Concordat also sets out procedures, including that:
- a business will be told what is good advice and what is a legal requirement;
 - as far as possible in the circumstances, there will be discussion before formal action is taken; and
 - if action does have to go ahead for urgent reasons, this will be followed by a prompt written explanation of the reasons.
27. The Concordat has similar objectives to the now repealed enforcement provisions in section 5 of the 1994 Act but excludes those elements with which enforcers and businesses had difficulty. Enforcers signing up to the Concordat do so voluntarily, and are encouraged to monitor their progress against it.
28. Announcing the launch of the new policy on 4 March 1998 (House of Commons Hansard, columns 692-94), the Parliamentary Secretary for the Cabinet Office said that where “minded to” procedures had been applied in primary legislation, these would be amended as the opportunity arose. The one order made under section 5 (the Deregulation (Improvement of Enforcement Procedures)(Food Safety Act 1990) Order 1996 (SI N^o: 1996/1683) ceased to have effect in England and Wales upon commencement of the Regulatory Reform Act at Royal Assent.
29. A full list of the organisations that have adopted the Concordat can be found on the Cabinet Office’s website¹⁴; it is updated monthly.

Enforcement Provisions in the Act

30. The Act repeals section 5 of the 1994 Act and replaces it with a power for Ministers to set out a code of good enforcement practice. This provides a safeguard if problems are encountered with the voluntary approach. The policy, including the “light-touch” nature of the reserve power, was the subject of a consultation exercise published by the Cabinet Office on 28 September 1999¹⁵ involving both enforcers and those subject to enforcement.
31. The provisions are designed to provide assurance to business, the voluntary sector and others that the Government would be able to bring pressure to bear on enforcers that failed to apply best practice along the lines of the Concordat. A code made under this power would not be directly binding on enforcers. But businesses found by a court or tribunal to be in breach of a statutory requirement would be able to ask for the enforcer’s failure to follow the code to be taken into account in determining the appropriate penalties, award of costs or other action.
32. The power is intended to counter unjustifiably inflexible or over-zealous enforcement. The provisions of the Act allow a code to be tailored to address the particular enforcement problem that had emerged. Before making an Order the Government must consult publicly on why and how the power should be used; any such consultation will follow the Government’s Code of Practice on Written Consultation¹⁶. This will explain the underlying circumstances, the enforcement bodies or activities that would be affected and the proposed content of the code. In accordance with the requirements of *Good Policy Making: A Guide to Regulatory Impact Assessment*¹⁷, published by

¹⁴ <http://www.cabinet-office.gov.uk/regulation/PublicSector/Enforcement/history.htm>

¹⁵ <http://www.cabinet-office.gov.uk/regulation/act/s5condoc.rtf>

¹⁶ <http://www.consultation.gov.uk>

¹⁷ available at <http://www.cabinet-office.gov.uk/regulation/2000/riaguide/default.htm>

the Cabinet Office, the consultation document will be accompanied by a thorough regulatory impact assessment, setting out the expected benefits to business as well as the impact on enforcers.

Assessment of Impact of Orders

33. The Cabinet Office produced a regulatory impact assessment for the Bill, which was placed in the Library of each House. Copies are also available from the Cabinet Office on 020 7276 2198 or by e-mailing ian.ball@cabinet-office.x.gsi.gov.uk or for download at <http://www.cabinet-office.gov.uk/regulation/act/ria.rtf>. The amendments during the passage of the Bill have not changed the regulatory impact assessment. In sum, the regulatory impact of the Act itself is negligible because it contains only enabling powers. The regulatory impact on business, charities, the voluntary sector, individuals or the public sector will flow from orders and any codes brought forward under the Act.
34. Each proposed regulatory reform order and any enforcement code brought forward will be accompanied by its own regulatory impact assessment. As orders are primarily aimed at lifting regulatory burdens, the net effect in each case is expected to be positive. Similarly, the provisions on the making of enforcement codes are intended to be for the benefit of business and so the result would be expected to be beneficial to business.
35. While the Act has no public expenditure implications itself, an order under it could give rise to the expenditure of public monies.

THE ACT

36. The sections of the Act may be conveniently divided into four main groups:
 - Section 1 sets out the order-making power and the context within which it can be exercised. Section 2 explains what is meant by the term “burden” and related expressions. Section 3 sets out the tests which have to be met by proposed orders, and limits the level of criminal penalties which can be imposed by an order. The flow-chart at **Annex H** details the preliminary checks against vices which a Minister must consider before embarking along the route of a regulatory reform order.
 - The second group of sections is concerned with the mechanics of order-making, which are only slightly different to the equivalent provisions in the 1994 Act. The flow-charts at **Annexes I** and **J** set out the steps involved, from identification of burdensome legislation which could be reformed through to the Parliamentary procedures which an order must undergo. Section 4 provides that orders shall be made by affirmative resolution, except that subordinate details of matters addressed by orders can be modified by either negative or either form of affirmative resolution. Section 5 sets out the consultation a Minister must undertake prior to laying before Parliament details of his proposed order. Section 6 gives details of the information the Minister must provide to Parliament alongside the proposed order. Section 7 governs the disclosure requirements for representations made during consultation on proposed orders. Section 8 sets out the procedure governing Parliament’s scrutiny of draft orders.
 - Sections 9, 10 and 11 make provision for Ministers (and, in certain limited circumstances, the National Assembly for Wales) to set out codes of good practice in relation to enforcement of statutory requirements.
 - The final group of sections is concerned with supplementary matters. Section 12 deals with repeals and savings. Section 13 makes consequential amendments to section 6 of the 1994 Act. Section 14 covers interpretation of terms and section 15 deals with the short title and territorial extent of the Act.

COMMENTARY ON SECTIONS

Section 1: Power by order to make provision reforming law which imposes burdens

37. *Subsection (1)* includes the main order-making power, and sets out the context within which it can be exercised. The governing purpose in this subsection constrains the power in a number of respects. It will be helpful to deal with each of these in turn.

“...by order make provision for the purpose of reforming legislation...”

38. This means that orders can only be directed at the reform of existing legislation. They cannot make entirely new provision; there has to be some Act or Acts of Parliament already in existence. So an order could not be used, for example, to remove burdens imposed solely by the common law.

39. The Act does not contain an express provision relating to common law, and it is not the intention to use the order-making power to seek to change, for example, the principles of contract law or of tort law. Under it, common law elements can only be dealt with within the context of reform of legislation. The anchor of the reform must be a piece or pieces of burdensome primary legislation (or a previous deregulation order or regulatory reform order), rather than common law. Legislation, whether primary or secondary, frequently affects the common law in this way. Legislation also frequently refers to common law concepts, such as contracts, and makes provision about them. To the extent that there has previously been no statutory provision on a matter, what is done will inevitably displace the common law to that extent. Particularly by virtue of the fact that the Act will enable limits to be removed from statutory powers, orders made under it are more likely to impinge on the common law than those made under the 1994 Act. This is very different from what is occasionally done, namely for a statute to make express provision amending a common law rule (often only capable of being described by reference to a particular case). The Act will not enable the Minister to make free-standing provision of this kind, even though it may be related to something which is covered by statute. Similar considerations apply in relation to Scots Private Law to the extent to which it is not in any case devolved.

40. The reference in this section to reform opens up the order-making power so that it can apply to a whole regulatory regime, addressing a number of different pieces of legislation if necessary. For example, the power could be used to simplify and rationalise the legislation governing fire safety, which is enshrined in approximately 120 Acts of Parliament and a similar number of statutory instruments. Where a burdensome situation results from such a variety of overlapping regimes, perhaps spread over primary legislation and secondary legislation (including different sets of regulations), the order could replace the entire range. The result would be the repeal of the legislation and new provision in what might be known as, for example, the Regulatory Reform (Fire Safety) Order. The confusion created by the variety of different provisions could be removed.

41. The term “reform” is given its natural meaning. Section 3(1) of the Law Commissions Act 1965 describes the systematic development and reform of the law as including “the codification of...law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law”. In the Act the term “reform” has a similar meaning (other than in relation to codification) to that which it has in the Law Commissions Act. The key difference is that the concept in the Law Commissions Act is intended to cover the whole of the law while the Act is concerned only with burdensome statute law (as detailed below).

“...make provision for the purpose of reforming legislation which has the effect of imposing burdens...”

42. The concept of “burden” is dealt with below at section 2. Beyond that, the effect of this part of the section is to preclude any order which is not predicated on the reform of burdensome legislation. So, for example, before the enactment of the Limited Liability Partnerships Act 2000, an order could not have been used to make entirely new provision creating a new form of legal entity for the incorporation of limited liability partnerships. But an order could have achieved the same end by amendment of the Limited Partnerships Act 1907. And an order could be used to remove the duplicatory accounting requirements whereby NHS bodies must submit accounts of charitable funds to the Charity Commission under charity law and also to the National Audit Office under health legislation.

“...make provision for the purpose of reforming legislation which has the effect of imposing burdens affecting persons in the carrying on of any activity”.

43. This echo from section 1 of the 1994 Act has the effect of concentrating the power on ongoing activities. In its 15th report of the 1999-2000 session, the Delegated Powers and Deregulation Committee reported that:

“Most legislation could be regarded as having such an effect. A considerable proportion of all bills are concerned with the amendment of earlier legislation which imposes burdens on individuals or corporations or which authorises or enables categories of person to act in a particular way.”

It is the Government’s policy intention to direct the order-making power to the benefit of business, charities, the voluntary sector, individuals and legal persons and the wider public sector, and consequently these words provide a wide gateway. In order to ensure that the gateway is no wider than necessary to achieve reform to regulatory regimes, the gateway is limited by the requirement that the reform must be “with a view to” the objects set out in section 1(1)(a) to (d) (see paragraph 50 et seq).

44. There is a key policy test not on the face of the Act that further restricts the use of the order-making procedure – that of appropriateness. This will be applied by the Minister when considering whether to propose using the regulatory reform order-making power, and will inform the consultation process. It will also form part of the consideration by the scrutiny Committees.
45. The Delegated Powers and Deregulation Committee, again in their 15th report of the 1999-2000 session, commented:

“Lord Falconer readily acknowledged that there is no precise line drawn in the draft bill between matters in respect of which it is appropriate to legislate by way of order and other matters in respect of which it would not be appropriate, nor is it the Government’s intention to try to draw one. It will, he said, be for Ministers to decide whether or not the use of the new power would be ‘appropriate’ (Q.13), likening the task of so deciding to the difficulty of defining an elephant. ‘You cannot describe it but you know it when you see it’ (Q. 13). When asked whether he would ‘be content to rely totally on a successor administration’s definition or interpretation of what was appropriate and what an elephant was’ Lord Falconer replied ‘Yes, I would’ (Q. 16). He also relied on the safeguard that both Committees would be expected to comment if they considered a proposal inappropriate....”.

46. During Committee stage, Lord Falconer of Thoroton (House of Lords Hansard, 23 Jan 2001, Col 209) acknowledged concerns over what might constitute appropriate use of the order-making power:

“As has been repeatedly stated by everyone involved, the power in the Bill is not suited to large and controversial measures. The entire procedure contained in the Bill would weed out such proposals. A highly contentious issue would come up against serious

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problems during the consultation period and the Minister, obliged to set all this out in the document he placed before Parliament, would have to reflect that explicitly. The scrutiny procedures in Parliament, involving careful examination by committees and the co-equal status of the two Houses, are such that any Minister would obviously be ill-advised to choose this route.”

47. The Government believes that the super-affirmative order-making process, with its thorough consultation and weighing of evidence, is well suited to the objective consideration of complex issues, where the judgement of experts is required, and for issues on which a group of reasonable people, given the relevant facts, would be likely to reach consensus. It may not always be clear at the start of the process that an issue falls into this category. If it were to become clear during the process that it is not suited, then the proposal could be withdrawn as a draft order and returned to the floor of the House in the form of a Bill. It should be noted that:
- as was the case with the arrangements for deregulation orders, the Parliament Acts will not be available to the Government during the scrutiny and Parliamentary approvals process of draft orders (see paragraphs 13 to 17 above, paragraphs 80 to 105 below and the diagrams at **Annexes I and J**);
 - the Committees will assess whether the use of delegated legislation is appropriate for any proposal and enjoy an effective veto over individual proposals (see paragraphs 15 and 17 above); and
 - the two Houses are treated as co-equals in the scrutiny process as there is no Commons over-ride.
48. Consequently, while the Government considers large-scale measures such as reform of fire safety legislation to be appropriate for the order-making procedure, politically controversial measures will continue to be reserved for debate on the floor of the House. Clearly it is not possible to draw up in advance a list of politically controversial items. It has to be a case-by-case judgement. For example, the Government contends that the following propositions are ruled out as inappropriate:
- any proposal aimed at **constitutional change**, such as amending the law on devolution or representation of the people;
 - any proposal primarily aimed at making changes to the **judicial system**, such as, for instance, altering the right to trial by jury for certain categories of offence (although lesser changes, such as the setting up of an appeals mechanism, might be made in the context of wider reform of a specific area of law);
 - any proposed changes to the structure or organisation of local government, such as setting up directly-elected **mayors** (although change might be made in relation to activities such as waste collection or administration of schools);
 - any reform of highly controversial employment law, such as fundamental reform of employment tribunals or the minimum wage.
49. Change in these sorts of areas would be for Parliament to consider as primary legislation. On the other hand, proposals which seek to deal with ongoing activities would be an appropriate use of the regulatory reform order-making power, for example:
- reform of the legislation governing **gambling**;
 - removal of the restriction that **school crossing patrols** can only assist children of school age across the road on their way to school and not, for example, younger siblings of schoolchildren (this proposal has now been delivered under section 270 of the Transport Act 2000);

- changes to employment law of an uncontroversial nature, such as the changes to Trade Union check-off rules achieved under the 1994 Act (Deregulation (Deduction of Pay of Union Subscriptions) Order 1998).

“...make provision for the purpose of reforming legislation which has the effect of imposing burdens affecting persons in the carrying on of any activity, with a view to one or more of the following objects”

50. From the starting point of burdensome legislation, an order must involve the first object in paragraph (a) in subsection (1(1), and may also involve any combination of the three objects in paragraphs (b) to (d). These act as a limitation on use of the order-making power, since it can only be exercised with a view to securing one or more of the objects. Given section 1(3), it is a requirement that every order will take in object (a), and will involve the removal or reduction of burdens.
51. Paragraphs (b) and (c) are concerned with the imposition of burdens. The 1994 Act only allowed burdens to be imposed where they are less onerous than the burden being removed, and only on those affected by the burden being removed. Paragraph (b) allows burdens to be carried over from the legislation under reform but only where they meet the objective of **proportionality**. Paragraph (c) goes a step further, in allowing an order to increase burdens on those already affected and to impose new burdens on people not previously subject to burdens at all, but again only where they too are proportionate. As with the tests in section 3, the Minister will have to justify his decision about how the order meets the objective of proportionality in the document he lays before Parliament under section 6. While the proportionality test differs from the other three tests because it is not expressed to be dependent on the Minister’s opinion, it is covered by the requirement for the power to be exercised “with a view to” securing one or more of the objects in section 1(1). It also has an objective legal meaning (although, in making a particular order, the application of the concept may be a matter for discussion). It will be of increasing relevance in other contexts given the application of the Human Rights Act 1998, 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 section 6.
52. Paragraph (d) provides for orders to remove inconsistencies and anomalies in legislation. This object will be particularly relevant when a Minister is using an order to reform a whole regulatory regime, because problems with burdensome regulatory regimes are often due to overlap between different pieces of legislation. This object is also likely to be relevant in the context of proposals from the Law Commission on reform of the law. The Law Commission’s programme of work results in the production of Bills ready for introduction to Parliament. However, due to the pressure on the legislative programme, these proposals might not reach enactment for several years. The provision at paragraph (d) will assist in enabling Law Commission proposals which fit the other criteria for orders under the Act to be implemented by order. Given section 1(3), it would not be possible for an order solely to remove an anomaly or inconsistency. In any event, most ‘inconsistencies and anomalies’ would already be covered under paragraphs (a) to (c) as removing them would normally entail the levelling up or down of some burden or other. Some instances of anomaly or inconsistency may not readily fit in with the concept of burden. For example, if one statute requires a notice to be given on a Tuesday and another, for no good reason, on a Wednesday, even though both refer to the same category of information, then it is not increasing or decreasing the burden to bring them into line, but it is removing

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an inconsistency or anomaly. The concepts of anomaly and inconsistency are closely linked. An inconsistency may occur where one provision requires a certain thing to be done and another requires something different without providing any way of reconciling the provisions. An anomaly occurs not so much where two pieces of legislation clash, but where the legislation fails to make the proper provision intended. For example, if a licensing regime treated all business registered before 19 February in one way, and all businesses registered after 19 February in another, the anomalous situation arises as to the status of those businesses registered on 19 February itself.

53. *Subsection (2)paragraph (a)* provides that an order may have as its subject any Act of Parliament which is more than two years old. This is a change from section 1(5)(c) of the 1994 Act, which limits application of the power to legislation passed before the end of the 1993-4 Parliamentary Session. The term “Act” is defined in Schedule 1 to the Interpretation Act 1978 (as amended by Schedule 8 to the Scotland Act 1998) as meaning an Act of Parliament. Northern Ireland legislation, therefore, is excluded (although consequential amendments to Northern Ireland legislation may be made using the power in section 1(5)(c)). Northern Ireland has in the past made its own provision to mirror deregulation orders.
54. The text in parentheses in paragraph (a) of subsection (2) makes clear that the legislation addressed by the order need not have been commenced. Instances where an order would be used to address uncommenced legislation are not expected to be frequent. However, it would allow the power to address cases such as the Sexual Offences (Protected Material) Act 1997, which creates a statutory scheme for supervising the defendant’s access to victim material in sexual offences cases (with the intention that this material cannot be circulated as a form of pornography). The Act, if commenced, would make it an offence for the defendant to have unsupervised access to the material or for any other person to whom the material is given to breach the requirements of the scheme. It appears, however, that (because of an oversight when preparing the legislation) there are significant problems with even the defence legal team viewing the material. This makes the Act unworkable, and so it has never been commenced. It would be a burden on the defence legal team and others not to be able to handle the material in the normal way. It is also currently a burden on the alleged victim of the sexual offence that she is unable to benefit from the protections intended by Parliament when the legislation was passed. Although cases of uncommenced legislation imposing burdens arise infrequently, the burdens can be significant and the provision in this paragraph will allow them to be addressed by regulatory reform order.
55. *Subsection (2)paragraph (b)* makes clear that deregulation orders made under section 1 of the 1994 Act and regulatory reform orders, if they fall within the purpose of section 1(1), may themselves be the subject of orders. The 1994 Act and this Act will be excluded because neither imposes burdens affecting persons in the carrying on of an activity. In any case, as the 1994 Act will only be preserved for devolved matters in Scotland (cf. section 12(1)(b)), it would not be a candidate for regulatory reform orders (which will be made at Westminster) as to do so would be at odds with that devolution settlement.
56. The remainder of subsection (2) sets out the arrangements with regard to legislation that has been devolved to Scotland. In order to reflect the Scottish devolution settlement, the power does not extend to legislation which is within the devolved competence of the Scottish Parliament. But, as explained below, section 12(1)(b) preserves the 1994 Act for use by Scottish Ministers, and it would be open to the Scottish Parliament to amend or replace it.
57. *Subsection (3)* states that any order made under the power contained in the Act must include provision aimed at removing or reducing burdens. This means that the power cannot be used to re-enact burdens, impose new or increased burdens, or remove inconsistencies and anomalies, without also removing or reducing burdens. However, the subsection does not make any numerical linkage between the burdens removed and

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those imposed, so the former need not necessarily outweigh the latter. But any order must still meet the strict safeguards contained in section 3.

58. The effect of *subsection (4)* is that the power cannot be used to address any provision in an Act which has been amended in the last two years, other than consequentially or incidentally. However, such legislation can be re-enacted without substantive change as part of a wider reform.
59. *Subsection (5)* reflects the Welsh devolution settlement. It provides that the consent of the National Assembly for Wales will be required for any order that sought to remove or modify any function of the Assembly. The regulatory reform order-making power itself is not available to the Welsh Assembly (though the Assembly may be given power to make subordinate provisions orders under section 4(6)).
60. *Subsection (6)(a)* makes clear that an order may amend or repeal any enactment in pursuance of reforming the burdensome legislation referred to in subsection (1). Paragraph (b) makes clear that burdens may be imposed on Ministers (cf. section 2(1), as described in paragraph 69 below, which excludes from the definition of “burden” any burden which affects only Ministers or government departments.) The effect of the two subsections is that, while a burden which falls solely on Ministers or departments may not be removed by regulatory reform order, such a burden may be imposed. Under section 43(1) of the Government of Wales Act 1998, the same applies to the National Assembly for Wales. Paragraph (c) provides a general power to make incidental, consequential, transitional or supplementary provision in standard terms to primary or secondary legislation. This could include amendment or revocation of secondary legislation, although this will normally be done by amending or remaking the instrument concerned under the existing power.
61. *Subsection (7)* makes clear that a regulatory reform order could vary its provisions from area to area. This means that an order could target a specific geographical location in a way similar to Local Acts.

Section 2: Meaning of “burden” and related expressions

62. This section is key to the understanding of what the order-making power is designed to achieve. *Subsection (1)(a)*, which reflects section 1(5)(b) of the 1994 Act, is intended to ensure that a “burden” includes:
 - restrictions on the carrying on of particular activities. This allows the order-making power to deal not only with cases where there is an explicit ban on something being done (a “thou shalt not” provision such as was addressed in the Deregulation (Long Pull) Order (SI N^o: 1996/1339) as detailed at paragraph 12 of **Annex B** below), but also with cases where there is a restriction in the sense that the legislation contemplates a possibility and then sets a limit (referred to as the “implicit restriction” cases - please see **Example 1** and **Example 2** below). A further example would be the legislation which allowed building societies to borrow non-retail funds and deposits up to a maximum of 40% of the society’s share and deposit liabilities – this was increased to 50% by the Deregulation (Building Societies) Order (SI N^o: 1995/3233) as detailed at paragraph 2 of **Annex B** below).

Example 1

The very first deregulation order, the Deregulation (Greyhound Racing) Order (SI N^o: 1995/3231), made new provision for inter-track totalisator betting. There was no explicit restriction in statute prior to the order being made (i.e. nothing which expressly prohibited inter-track totalisator betting on greyhound races), but there was an implicit restriction in that provision was made for inter-track totalisator betting on horse races but not on greyhound races. The order set out that inter-track totalisator betting on greyhound races was permissible, and set out a new regulatory regime governing it.

- requirements, including procedural requirements. For example, the requirement for purchasers of corn to submit weekly returns to central government, which was addressed by the Deregulation (Corn Returns Act 1882) Order (SI N^o. 1996/848) (paragraph 6 of **Annex B**).

Example 2

The Deregulation (Bills of Exchange) Order (SI N^o. 1996/2993) made new provision empowering bankers to present cheques for payment by notification of their essential features by electronic means, rather than by their physical presentment. Here there was clearly no explicit or implicit restriction on electronic notification in the relevant legislation; electronic transmission was an alien concept when the Bills of Exchange Act was passed in 1882 and the idea that there was any possibility other than physical presentment was simply not contemplated. The burden of the requirement for physical presentment and the inability to take full advantage of advances in technology was removed. New provision was made to enable the electronic system (which was already operating alongside physical presentment) to take the place of physical presentment for legal purposes.

- conditions, for example, the 48-hour waiting period before a person can become a member of a gaming club, which was reduced to 24 hours by the Deregulation (Casinos) Order (SI N^o. 1997/950) (paragraph 26 of **Annex B**). “Condition” catches a different category of measure from “requirement” because it refers to procedures which affect people only if they wish to achieve a certain result (such as becoming a member of a gaming club) rather than a requirement which must be met in all cases;
 - sanctions (whether criminal or otherwise) for failure to observe a restriction or to comply with a requirement or condition. This provision makes clear that a sanction alone may be a burden for the purpose of this Act, even if the requirement, restriction or condition to which it relates is not being modified by the order. An order could thus, for example, leave a restriction unchanged but impose a civil rather than a criminal penalty. Equally, but in practice likely to be exceptionally, an order could replace a civil penalty with a criminal one provided the tests were met. Criminal sanctions can in practice be less burdensome than civil sanctions, particularly where civil liability then does not attach. In addition, the higher burden of proof needed to justify the imposition of criminal sanctions may give greater protection to the accused.
63. Restrictions, requirements and conditions in legislation can make it burdensome. However, it is important to understand that even legislation which includes restrictions, requirements or conditions may be enabling in that it allows people to do things but at the same time sets the boundaries within which they can do it. In such cases if the legislation were not there at all, they would not be able to do it at all. The legislation only becomes burdensome when the boundaries are not wide enough, and perceptions of that are likely to change over time and with circumstance.

Example 3

The governors of maintained schools, as creatures of statute, only have power to do things for educational purposes. Their powers are limited to those set out in legislation. There is power to enable them to let out their premises in the evenings for activities such as art classes for adults, and such arrangements are common. However, what they do is simply to make their facilities available, often for a fee. They are not permitted to run activities themselves, unless the activity is related to or incidental to providing education, and so the actual provision is not by the school but by someone else.

The Government would like to use a regulatory reform order confer on governing bodies power to provide pure childcare. There is no specific statutory restriction on schools offering childcare. But there is no provision for them to do it either, as set out above. This lack of provision is a limit on what they can do and a restriction in the

natural meaning of the word. An order to effect this change would rely on section 2(1)(b).

64. The definition of “restrictions, requirements and conditions” which appeared in the 1994 Act is extended by subsection (1)(a) to cover those which prevent the incurring of expenditure. This would enable, for example, the reforms planned to the Vaccine Damage Payments Scheme. Currently, payments may be made to people who have been vaccinated and are 80% disabled, if they claim within six years. The Department of Work and Pensions proposes to allow those who are 60-80% disabled to be able to claim and to extend the time limit to age 21 for minors. This reform would widen eligibility to payments under the scheme and so would involve expenditure.
65. *Subsection (1)(b)* provides that, in addition, “burden” includes any limit on the statutory powers of any person. This means that a regulatory reform order may extend the statutory powers of a person, hence enabling them to do something which they could not otherwise do because there is no statutory provision for them to do it. This aspect of the power is aimed at dealing with cases where there is clearly a limit on what someone can do but there is no “restriction” in the sense in which it is used in subsection (1)(a), as described above. Early in the life of the 1994 Act, a number of deregulation orders were made which in practice empowered people to do things they could not otherwise do. These orders drew on the range of statutory concepts which now appear in subsection (1)(a), sometimes in combination.
66. However, difficulties that arise with some statutory provisions can only be resolved by providing for people to have express power to do things.

Example 4

The Trustee Investments Act 1961 provides default powers that, inter alia, enable trustees to invest in some things but not others. The proposed Deregulation (Trustee Investments) Order, laid in February 1997, sought to remove the restriction on what trustees could invest in, thus enabling them to invest in whatever they chose. An argument could be mounted that legally the 1961 Act was in fact a liberating measure, set against the common law and statutory history of gradual easing of investment powers. If the 1961 Act were not in existence, trustees without explicit or sufficiently wide powers of investment in their trust documents would be able to invest in even fewer things. So it could be argued that the 1961 Act legally defined rather than restricted trustees’ default powers. But, in reporting on this proposed deregulation order, the House of Lords Delegated Powers and Deregulation Committee, which scrutinises deregulation orders, was satisfied that in present day circumstances the Act constituted a restriction and therefore a burden. However, the proposal was not pursued following cautious advice that there was a risk that the order could be held to be ultra vires on the basis of a narrow view of “restriction”. If widows and orphans had lost as a result of trustees reasonably investing on the basis of the order, either the trustees or perhaps the Government could have been liable.

The risks in this case outweighed the benefits of early change which would have resulted from a deregulation order. The change has since been taken forward as part of the Trustee Act 2000.

67. The reference to “any limit” in subsection (1)(b) is designed to provide a straightforward and explicit basis for orders which empower people to do things they are not currently able to do, covering cases in the future of a kind such as after-school childcare (see **Example 3** above) and trustee investments (see **Example 4** below).
68. The text in parentheses in subsection (1) paragraph (b) makes clear that an order which enables something to be done may authorise expenditure. This would allow, for example, the statutory definition of physical training and recreation to be amended to include chess and other “mind games” so that, among other things, they would be allowed access to the Lottery Sports Fund in England.

69. The remainder of subsection (1) excludes from the definition of “burden” any burden that only affects a Minister of the Crown or government department. This means that local authorities, schools, hospitals, non-departmental public bodies and other public sector bodies could be the sole beneficiaries of an order. Ministers and government departments cannot be the sole beneficiaries; someone else must also benefit. In debate, Ministers explained that beneficial effects on others could be sufficient to permit the removal of a burden affecting Ministers alone (Lords Committee, 23 Jan 2001, Col. 168):

“One has to consider the effect of the statutory restriction or the statutory matter that one is considering reforming in terms of burden. If that burden affects only a Minister-- Clause 2(1)--it cannot be changed. If the effect goes wider, for example because it affects the applicants for compensation, it can be changed.”

70. *Subsection (2)* makes clear that any reference to creating, imposing, removing or reducing burdens applies not only to free-standing burdens but also to situations where the law authorises or requires a burden to be imposed. This will allow orders to deal with cases where the primary legislation itself cannot be said to impose a burden because all it does is confer a power, but where what can be done under the power is burdensome. For example, the mergers legislation does not itself prohibit mergers, but it authorises the Secretary of State to do so in certain circumstances.

Section 3: Limitations on the order-making power

71. This section constrains the order-making power by imposing four tests, and the Minister proposing an order would be required to seek views on the extent to which the proposal met the safeguards as part of the prior consultation exercise, required under section 5.
72. The first two tests apply to all orders. The first test, in *subsection (1) paragraph (a)*, demands that the Minister making the order must be of the opinion that it does not remove any **necessary protection**. This test is reproduced from section 1(1)(b) of the 1994 Act, 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 Codes of Practice or British or international standards. 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. 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 B**).
73. The second test, in *subsection (1) paragraph (b)*, demands that the Minister making the order must be of the opinion that it will not prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise. This “**reasonable expectations**” test is new to the Regulatory Reform Act. It 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. (During the passage of the Bill,

Cabinet Office Ministers submitted evidence to the Joint Human Rights Committee on the compliance of regulatory reform order-making with human rights obligations, as set out in **Annex L** and published by the JCHR¹⁸.) The “reasonable expectations” test 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.

74. *Subsection (2)* sets out two further tests, also new to the Regulatory Reform Act, that apply only to orders that impose new burdens. (These are over and above the requirement of **proportionality** which is in section 1(1), as described in paragraph 51 et seq).
75. The first test states that 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. To return to the illustrative example used in paragraph 51 above, the Minister may 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. Again, whatever the Minister decides, he must explain his reasoning in the document he lays before Parliament under section 6.
76. The second 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 section 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.
77. The further limitations on the power included in this section reflect provision made in the 1994 Act. *Subsection (3)* sets the maximum penalties that can be imposed for a new criminal offence created by an order under the power. The maximum penalty can be higher when the offender is convicted on indictment (in the Crown Court in England or Wales, and in the High Court or the Sheriff’s Court in Scotland) than when he is convicted summarily (in a Magistrates’ Court in England and Wales and in the Sheriff’s Court in Scotland). The maximum penalty is two years’ imprisonment and/or an unlimited fine on indictment or six months’ imprisonment and/or a fine of (currently) £5,000 on summary conviction. This amount will vary as the standard scale is changed or, in the case of the legislation cited in the subsection, the statutory maximum.
78. Some offences are triable either summarily or on indictment, and *subsection (4)* ensures that the relevant limits in subsection (3) apply to certain cases involving minors.
79. *Subsection (5)* limits the enforcement powers which can be conferred by a regulatory reform order. Powers of forcible entry, search and seizure, and powers to compel people to give evidence, may only be conferred in similar circumstances to provision made for that purpose in the legislation being reformed.

Section 4: Statutory instrument procedure

80. *Subsection (1)* requires that orders be made by statutory instrument. *Subsection (2)* sets out the standard provision for the draft affirmative order procedure.

18 <http://www.publications.parliament.uk/pa/jt200001/jtselect/jtrights/73/7312.htm>

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81. *Subsections (3)-(11)* provide for detailed provisions of orders to be amended by either negative or either type of affirmative resolution procedure. The wide scope of the 1994 Act enabled matters to be prescribed by a further instrument (as, for example, with the Deregulation (Corn Returns Act 1882) Order (SI N^o. 1996/848) where minor detail was set out in the Corn Returns Regulations (SI N^o. 1997/1873)). However, this power was very limited in practice, because of the need to ensure that any such regulations maintained necessary protection.
82. The Act does not contain an express power for orders to sub-delegate. However, given that it would be possible for an order to re-enact existing provision and that it can do so with or without amendment, one option that would help preserve flexibility would be for an order to adapt an existing power to make delegated legislation. Such a reform could involve extending an existing order-making power to cover new but related matters, but not to the extent of providing for an open-ended and unconstrained power or one covering entirely new provision from that permitted by the original delegated power.
83. Where that option was not available, it would be open to the Minister to identify certain provisions in the draft regulatory reform proposal as subordinate. This new approach allows Parliament to see what is proposed as subordinate provisions when considering the draft regulatory reform order but also enables such provisions to be amended subsequently by statutory instrument. It allows for parts of a proposed regulatory reform order to be designated as subordinate provisions, thereby enabling Ministers to change them subsequently either by negative resolution order or either form of affirmative resolution order, if the need arises. It is envisaged that subordinate provisions would usually be included in schedules to the main part of the regulatory reform order, in the same way as technical detail is omitted from Articles in European Community legislation, but rather set out in Annexes.
84. This approach is more open and accountable, in that the elements that the Minister sees as subordinate would have to be identified in advance in the consultation paper, the draft Order itself and details provided in the explanatory document presented under Section 6. In order to satisfy the scrutiny Committees that there was not an issue of inappropriate sub-delegation, the main order would set out the principles that govern the detailed matters and those principles would not themselves be amendable – but the detail as identified as subordinate provisions would be amendable. During consideration of the proposed regulatory reform order, the main safeguards would be the ability of either scrutiny Committee to:
 - insist, on pain of an adverse report, that the main principles were set out in the main part of the order, which would be unamendable (except by a further full regulatory reform order). Indeed, the Committees could set out in their reports what unamendable principles they would require in the main body of the order – for instance, they could decide that the main order should set out the principles governing the sale of goods by weight, but that it could also identify as subordinate provisions a schedule setting out the precise list of those goods that were to be sold by weight; and
 - similarly insist that any change to particular subordinate provisions should be by way of affirmative rather than negative resolution procedure.
85. Subsequently, there would be the additional safeguard of further Committee scrutiny at the time any subordinate provisions order was made by either negative or affirmative resolution procedure. Under Commons Standing Order 141, the Deregulation and Regulatory Reform Committee, rather than the Joint Committee on Statutory Instruments, will scrutinise subordinate provisions orders. The Delegated Powers and Regulatory Reform Committee will perform the same function in the Lords.
86. As the order has to be tabled in a complete form as a combination of both main and subordinate provisions, it will not be possible to have a “skeleton” order. The kind of details that will be dealt with by a subordinate provisions order (which could have been

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dealt with by way of further sub-delegation under the 1994 Act) will include matters of administrative arrangement such as the precise detail of an application form, the number of copies of the form required (where it is to be submitted other than electronically) and any accompanying fee, etc. In addition, a subordinate provisions order might cover the more technical details of the legislation, such as procedures needed to give effect to principles set out in the main part of the order. Such details may change from time to time. Without provision for a subordinate provisions order, the only way to change the details would be to undergo the full consultation and scrutiny procedure, which might be viewed as an inappropriate use of Parliamentary time and would be likely to lead to delay.

87. *Subsection (5)* makes clear that subordinate provisions orders can make provisions that purely apply burdens and that, as such, the safeguard in section 3(2)(b) does not apply. This is to ensure that subordinate provisions orders could be used, for example, to raise the level of a fee from time to time. They could also be used, for example, to add to lists of things subject to some requirement.
88. *Subsection (6)* specifies the role of the National Assembly for Wales in making subordinate provisions orders relating to Wales. The purpose is to reflect the devolution settlement.
89. *Subsections (7) to (9)* allow a main regulatory reform order to provide for subordinate provisions orders to be subject to either negative resolution or an alternative form of affirmative resolution. The alternative affirmative procedures are for subordinate provisions orders to be made following approval by both Houses, or for them to be made without approval but to cease to have effect unless approved within 28 days (not counting recesses).
90. *Subsection (10)* makes a technical amendment for the purposes of the Statutory Instruments Act 1946 and *subsection (11)* makes clear that subordinate provisions orders are not subject to the public consultation and Parliamentary scrutiny procedures required for the regulatory reform orders themselves.

Section 5: Preliminary consultation

91. This section sets out the first steps in the procedure for making an order, and is based on section 3 of the 1994 Act, with some additions to take account of the widened power. *Subsection (1)* lists those parties who must be consulted by a Minister before he takes his proposals any further. Under paragraph (c) the Minister is required to consult the Law Commission and/or Scottish Law Commission “in such cases as he considers appropriate”. The circumstances in which this might be the case would be when one of the Commissions had relevant experience concerning the subject-area covered by the order, perhaps because it was within the current or recent programme of work. It is envisaged that this would be likely in cases where the reform touched on the common law or where the removal of inconsistencies and anomalies was contemplated. Under paragraph (d) the Minister is also required to consult the National Assembly for Wales when provision made by the order would extend to (i.e. apply within) Wales.
92. If the Minister varies his proposals as a result of the consultation he has undertaken, *subsection (3)* requires him to consult again as appropriate. The subsection makes clear that the Minister does not have to repeat the whole consultation exercise; the additional consultation is only in respect of those elements of his proposal that he has changed and might involve only those consultees affected by the change.
93. *Subsection (4)* allows any proposal that has undergone the consultation process before the Bill was passed to be carried over, without having to repeat the consultation. A form of words was agreed with the current scrutiny Committees for insertion in any consultation documents on prospective use of the power, and can be found at **Annex K**.

Section 6: Document to be laid before Parliament

94. As detailed in the description of the order-making process at paragraph 13 et seq above, the next step following the required consultation is for the Minister to lay his proposals before Parliament. *Subsection (1)* sets out how this is to be done. The Minister has to lay a document in the form of a draft order, setting out in detail all the relevant information about his proposals, as specified in *subsection (2)*.
95. This information enables the Committees scrutinising the proposal to take into account all the relevant factors. Once laid before Parliament, this document is in the public domain.
96. Proposed regulatory reform orders 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.

Section 7: Representations made in confidence or containing damaging information

97. This section sets out what should be done when someone responding to the consultation exercise on a proposed order requests that their response should not be disclosed. The reason for allowing representations to be made in confidence is that, for example, where there is a proposal to relax a requirement, someone might want to show how the existing control has enabled a major fraud to be detected. Or there may be commercially confidential information either as to the benefits or adverse effects to be expected as a result of a proposed order.
98. *Subsection (2)* makes clear that the fact that the respondent has made representations should always be disclosed. That is, no respondent would be able to exclude his name from the list of respondents that is presented to Parliament under section 6(2)(k). However, the Minister should not disclose the content of that representation without the express consent of the respondent and, if the representation relates to a third party, their consent too. Alternatively, the Minister may disclose the content of the representation in such a way as to preserve the anonymity of the respondent and any third party involved.
99. In debate, Ministers stressed the primacy of propriety and openness (Lord McIntosh of Haringey, House of Lords Hansard, 13 Feb 2001, col 200-201):

"The purpose of requiring Ministers to disclose the names of respondents to the committee is to prevent them from being subjected to undue pressure to make particular changes to legislation. I repeat that a weak or corrupt Minister might want to keep secret representations that were to the financial or political advantage of the Government and might influence his judgement. We would certainly wish to head off concerns about the possibility of secret representations from those with financial interests. Although it is a matter of protecting Ministers, it is also a matter of protecting the public from Ministers who might misrepresent the consultation process for their own ends".
100. *Subsection (3)* governs the requirements for disclosure where a respondent has given information about a third party which the Minister believes may be damaging to the interests of that third party. In such cases the respondent may not have requested confidentiality. The Minister does not have to pass on such information to Parliament if he does not believe it is true or he is unable to obtain the consent of the third party to disclosure.
101. However, there may be cases where one or both of the Scrutiny Committees wishes to have access to the representations as originally submitted. *Subsection (4)* provides for this. This provision acts as a safeguard against improper influence being brought to bear on Ministers in their formulation of regulatory reform orders. The fact that responses

may be released to the Committees in this way will be made clear in the consultation document accompanying any proposed order.

Section 8: Parliamentary consideration of proposals

102. This section mirrors section 4 of the 1994 Act. *Subsections (1) and (2)* provide that Parliament shall have 60 days to consider any proposal laid in the form of a draft order. Only after the 60 days have passed may the Minister proceed to lay a draft order. As set out in Parliamentary Standing Orders, this 60 days is the time during which the two Scrutiny Committees scrutinise the proposed order and produce their reports.
103. *Subsection (3)* excludes from the calculation of the 60 day period any time when Parliament is not sitting for more than four days. The effect is to extend the period for Parliamentary scrutiny so that it does not pass while Parliament is not sitting and cannot therefore consider the proposal. Consideration of proposed orders will be carried over automatically from one Session to the next, and from one Parliament to the next.
104. *Subsections (4) and (5)* are concerned with the next stage in the procedure, when the Minister lays the draft order proper. Subsection (4) requires him to take account of any representations made during the 60 day period and in particular the reports from the Scrutiny Committees. Subsection (5) requires him to lay a statement alongside the draft order, giving details of any such representations, resolutions or reports, and to highlight any changes he has made to the proposed order as a result.
105. *Subsection (6)* makes clear that the provision in section 7 for representations made in confidence or containing damaging information applies to any representations made during the 60 days as well as to those made during the preliminary consultation stage. The exception is the provision for the scrutiny Committees to request access to particular representations, which only applies at the earlier stage.

Section 9: Codes relating to enforcement of regulatory requirements

106. *Subsection (1)* confers a power to make codes of practice relating to enforcement of regulatory requirements. Subsection (1)(a) outlines the first element of the context within which the power is intended to operate: the identification of statutory requirements that are enforced. Use of the terms “restriction”, “requirement” and “condition” is explained at paragraph 62 above.
107. Paragraph (1)(b) outlines the second precondition that must be met before the power can be exercised. In forming its view that the enforcement officers’ practice “ought to be improved”, the appropriate authority (as defined at subsection (5)) might take into account factors such as the take-up and compliance with the Enforcement Concordat and the extent and merit of business dissatisfaction with current enforcement practice. It will be a matter of judgement by the appropriate authority whether the current practice “ought to be improved”. That view will be tested by consultation, which is provided for in section 10.
108. The remainder of subsection (1) provides that, if these two preconditions are met, the appropriate authority may issue a code of practice setting out recommended enforcement practice. A code of practice would be likely to contain elements based on, but not identical to, the existing Enforcement Concordat.
109. *Subsection (2)* sets out two different but not exclusive approaches for framing a code. The aim is to allow a code to be tailored to the enforcement problems that are driving Ministers to exercise the power. Subsection (2)(a) provides that a code could apply to all enforcement officers enforcing a particular legal requirement. For example, it could apply to any enforcement officer enforcing the law on health and safety at work. If this approach were to be followed, the code would include a list of the legislation to which it applied. The alternative approach, at subsection (2)(b), is for a code to apply more specifically to enforcers of a particular description, or to enforcers in specified

areas. For example, a code could be applied to all trading standards officers or to all environmental health officers, or to all such officers in a particular geographical area.

110. *Subsection (3)* deals with the effect of any code. The first stage, at subsection (3)(a), is for a court or tribunal to have found that a defendant is guilty of a breach of a restriction, requirement or condition. The second stage is to determine whether there is a relevant code of practice (as detailed at subsection (3)(b)). If so, the court or tribunal may form a view whether enforcement officers failed to comply with the code (as detailed at subsection (3)(c)). Once these three steps have been completed, the court or tribunal may take into account that failure in deciding how to deal with the regulatory breach. The court would not take compliance with the code into account in determining whether or not a regulatory breach had occurred. The way in which the court or tribunal may take non-compliance with the code into account might be when considering the appropriate penalty for an offence or in considering awards of costs. This approach means that the code is not directly binding on enforcement bodies and there is no direct penalty on the enforcement authority for non-compliance.
111. The effect of *subsection (4)* is to limit application of any code in Scotland to those matters that have been reserved to the UK Parliament.
112. *Subsection (5)* defines several terms. The “appropriate authority” exercising the power will normally be a UK Minister at Westminster (expected to be the Minister for the Cabinet Office). However, in the case of a code that relates to an enforcement function of the National Assembly of Wales, such as the control of animal health and welfare in Wales, the Assembly is given the power to set out a code. A UK Minister at Westminster could also exercise the power in respect of these functions but only with the consent of the Assembly. This provides a mechanism by which a single code embracing enforcement in both England and Wales could be applied if considered appropriate. For example, one code could apply to all farm inspectors in England and Wales, assuming that there is consensus between the UK Government and the Assembly.
113. The definition of “enactment” does not affect the meaning of this term in sections 1-8. Its effect is that the subject of any code may be subordinate legislation as well as restrictions, requirements and conditions imposed directly by primary legislation.
114. The effect of the definition of “enforcement officer” is the same as that in section 5(6) of the 1994 Act.

Section 10: Making of codes of practice by designated Minister

115. **Section 10** sets out an established procedure for making or revising codes of practice. Similar procedures appear in section 9B of the Fire Precautions Act 1971, section 38 of the Road Traffic Act 1988 and section 85 of the School Standards and Frameworks Act 1998. A feature of the procedure is that the provisions of the relevant code of practice do not themselves become provisions of an order or statutory instrument, but the code is brought into force by a statutory instrument as set out in *subsection (5)*.
116. *Subsections (1) and (2)* require that a draft code be produced and that various parties with an interest are consulted. This includes the National Assembly for Wales where the draft relates to Wales.
117. *Subsections (3) to (8)* provide for Parliamentary scrutiny of any proposed code. Subsection (4) makes provision for Parliament to veto any proposed code if it sees fit to do so, but as subsection (6) makes clear, this is without prejudice to the Minister’s ability to take up any proposed code and replace it with an amended draft for further Parliamentary scrutiny.

Section 11: Making of codes of practice by National Assembly for Wales

118. **Section 11** is the Welsh counterpart of section 10. It requires the National Assembly for Wales to consult on any draft code before bringing the code into force under the

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Assembly's own statutory instrument. The procedure appropriate for laying an order giving effect to a code of practice proposed by the National Assembly is a matter for the Assembly to determine.

Section 12: Repeals and savings

119. *Subsection (1)* repeals sections 1-5 of, and Schedule 1 to, the 1994 Act except so far as they relate to the making of orders by Ministers in the Scottish Parliament. The deregulation order-making power under sections 1 to 4 was devolved under the Scotland Act 1998, and the procedure amended by Article 117 of the Scotland Act 1998 (Consequential Modifications) (N^o. 2) Order 1999 (SI N^o. 1999/1820). It is therefore available for use by Scottish Ministers as regards devolved matters as they see fit. The regulatory reform order-making power will not be available to Scottish Ministers. In line with the devolution settlement, it will be possible for UK Ministers to make orders that cover reserved matters in Scotland, but they will not be able to make orders covering devolved matters. If the legislation under reform was passed before the Scotland Act 1998, covers Scotland as well as England and Wales and applies to a devolved matter, a UK Minister may:
- act independently from the Scottish Parliament, repealing the legislation so far as it relates to England and Wales and replacing the provisions with a regulatory reform order. This means that the old primary legislation would still apply in Scotland; or
 - work with the Scottish Parliament to ensure that the changes made by the regulatory reform order were mirrored in Scotland and the old legislation repealed in its entirety. Unless and until the Scottish Parliament creates its own regulatory reform Order-making power, any changes which are outwith the 1994 Act vires would have to be made by Scottish primary legislation.
120. Similar arrangements apply in relation to the powers under section 5 of the 1994 Act.
121. If, on the day the Regulatory Reform Act received Royal Assent, a proposed deregulation order had begun its 60 day Parliamentary scrutiny, but had not reached the stage when the draft order was formally laid, then *subsection (2)* allowed it to be carried over and to complete its passage as a deregulation order notwithstanding the repeal of the 1994 Act. There were four proposals for deregulation orders that fell into this category, as listed at the end of **Annex B**.
122. *Subsection (4)* makes clear that any deregulation orders passed under the 1994 Act are not affected by the repeal of the 1994 Act.

Section 13: Consequential amendments

123. Section 6 of the 1994 Act (which enables the Secretary of State to prescribe model provisions with respect to appeals) contains defined terms which refer to section 5 of the Act. Consequential amendments are needed to ensure that section 6 remains intelligible after the repeal of section 5. As the repeal does not extend to Scotland, *subsection (2)* provides that this section also does not extend to Scotland.

Section 14: Interpretation

124. The effect of defining Wales as it is defined for the purposes of the Government of Wales Act 1998 is that the sea around Wales is included.

Section 15: Short title and extent

125. *Subsection (2)* provides that the Act extends to Northern Ireland (cf. paragraph 53 above) *Subsection (3)* makes clear that regulatory reform orders may have the same territorial extent as the legislation being reformed.

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COMMENCEMENT

126. The provisions of the Act came into effect on Royal Assent.

HANSARD REFERENCES

127. The following table sets out the dates and Hansard references for each stage of this Act's passage through Parliament.

Stage	Date	Hansard reference
House of Lords		
Introduction	7 December 2000	Vol 620 Col 31
Second Reading	21 December 2000	Vol 620 Cols 850-902
Committee (1 st day)	23 January 2001	Vol 621 Cols 161-210 and 218-252
Committee (2 nd day)	25 January 2001	Vol 621 Cols 359-422
Report	13 February 2001	Vol 622 Cols 146-216
Third Reading	19 February 2001	Vol 622 Cols 513-539
Proceedings after Third Reading	26 February 2001	Vol 622 Cols 941-943
House of Commons		
Second Reading	19 March 2001	Vol 365 Cols 22-137
Committee (1 st sitting)	27 March 2001	Standing Committee A
Committee (2 nd sitting)	27 March 2001	Standing Committee A
Committee (3 rd sitting)	29 March 2001	Standing Committee A
Report and Third Reading	5 April 2001	Vol 366 Cols 524-596
Royal Assent	10 April 2001	

Cabinet Office October 2001

ANNEX A: STANDING ORDERS RELATING TO REGULATORY REFORM ORDERS

Note: paragraphs 8, 16 and 17 of the Explanatory Notes refer.

STANDING ORDERS OF THE HOUSE OF COMMONS

(NOTE: It is likely that the following Standing Orders will need to be revised once the final tranche of deregulation orders has been dealt with, as described at [paragraph 10](#) above)

Consideration of draft deregulation orders, etc

- 18(1)** If the Deregulation and Regulatory Reform Committee has reported under paragraph (3) of Standing Order N^o. 141 (Deregulation and Regulatory Reform Committee) that a draft order laid before the House under section 1 of the Deregulation and Contracting Out Act 1994 or under section 1 of the Regulatory Reform Act 2001 should be approved and a motion is made by a Minister of the Crown to that effect, the question thereon shall-
- (a) if the committee's recommendation was agreed without a division, be put forthwith;
 - (b) if the committee's recommendation was agreed after a division, be put not later than one and a half hours after the commencement of proceedings on the motion.
- (2) If the committee has reported that a draft order should not be approved, no motion to approve the draft order shall be made unless the House has previously resolved to disagree with the committee's report; the questions necessary to dispose of proceedings on the motion for such a resolution to disagree shall be put not later than three hours after their commencement; and the question shall be put forthwith on any motion thereafter made by a Minister of the Crown that such a draft order be approved.
- (3) Motions to which this order applies may be proceeded with, though opposed, until any hour.

Deregulation and Regulatory Reform Committee

- 141(1)** There shall be a select committee, called the Deregulation and Regulatory Reform Committee, to examine--
- (i) every document containing proposals laid before the House under section 3 of the Deregulation and Contracting Out Act 1994 (the 1994 Act) or under section 6 of the Regulatory Reform Act 2001 (the 2001 Act);
 - (ii) every draft order proposed to be made under section 1 of the 1994 Act or section 1 of the 2001 Act; and
 - (iii) every subordinate provisions order or draft of such an order made or proposed to be made under sections 1 and 4 of the 2001 Act.
- (2) The committee shall report to the House, in relation to every proposals document referred to in paragraph 1(i) of this order, either
- (a) that a draft order in the same terms as the proposals should be laid before the House; or
 - (b) that the proposals should be amended before a draft order is laid before the House; or
- (3) The committee shall report to the House, in relation to every draft order referred to in paragraph 1(ii) of this order, its recommendation whether the draft order should be approved.

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- (4) The committee may draw the special attention of the House to any subordinate provisions order or draft order referred to in paragraph 1(iii) of this order, and may report its opinion whether or not the order or draft order should be approved or, as the case may be, annulled.
- (5) The committee may report to the House on any matter arising from its consideration of the said proposals, draft orders or subordinate provisions orders.
- (6)(A) In its consideration of proposals the committee shall consider in each case whether the proposals
 - (a) appear to make an inappropriate use of delegated legislation;
 - (b) remove or reduce a burden or the authorisation or requirement of a burden;
 - (c) continue any necessary protection;
 - (d) have been the subject of, and take appropriate account of, adequate consultation;
 - (e) impose a charge on the public revenues or contain provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribe the amount of any such charge or payment;
 - (f) purport to have retrospective effect;
 - (g) give rise to doubts whether they are *intra vires*;
 - (h) require elucidation, are not written in plain English or appear to be defectively drafted;
 - (i) appear to be incompatible with any obligation resulting from membership of the European Union.
- (7) In its consideration of draft orders, the committee shall consider in each case all such matters set out in paragraph (6) 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.
- (8) In its consideration of any subordinate provisions order the committee shall in each case consider whether the special attention of the House should be drawn to it on any of the grounds on which (in accordance with paragraph 1(B) of Standing Order N^o. 151 (Statutory Instruments (Joint Committee)) the Select Committee on Statutory Instruments may draw the attention of the House to a statutory instrument; and if the committee is of the opinion that any such order or draft order should be annulled, or, as the case may be, should not be approved, they shall report that opinion to the House.
- (9) The committee shall consist of eighteen members.
- (10) 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.
- (11) 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 within the United Kingdom, 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;
 - (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 within the United Kingdom;
 - (d) to communicate its evidence and any other documents relating to matters of common interest to any committee appointed by this House and to any

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committee appointed by the Lords to examine deregulation and regulatory reform proposals and draft orders.

- (12) The committee and the sub-committee shall have leave to meet concurrently with any select committee appointed by the Lords to examine deregulation and regulatory reform proposals and draft orders and any sub-committee thereof.
- (13) The committee and the sub-committee shall have the assistance of the Counsel to the Speaker and, if their Lordships think fit, the Counsel to the Lord Chairman of Committees.
- (14) 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 and such Members may, at the discretion of the chairman, ask questions of those witnesses; but no Member not being of the committee shall otherwise take part in the proceedings of the committee or sub-committee, or be counted in the quorum.
- (15) It shall be an instruction to the committee that before reporting either
 - (a) that any proposal should be amended before the draft order is laid before the House, or
 - (b) that the order-making power should not be used in respect of any proposal, or
 - (c) that any draft order should not be approved,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.
- (16) It shall be an instruction to the committee that it report on every draft order (not being a subordinate provisions order) not more than fifteen sitting days after the draft order was laid before the House, indicating in the case of draft orders which it recommends should be approved whether its recommendation was agreed without a division.

STANDING ORDERS OF THE HOUSE OF LORDS

(NOTE: at the time of printing, the House of Lords had not yet considered what changes might be needed to the Standing Orders set out below which apply to the consideration of proposals for deregulation orders)

- 40** Notices shall be entered in the Order Paper in the order in which they are received at the Table, provided that:
- (1) Starred Questions shall be entered before other business.
 - (2) Notices relating to Private Business may be entered before Public Business. At the discretion of the Chairman of Committees they may also be entered later in the Order Paper.
 - (3) Notices relating to the Business of the House and to the Chairman of Committees' Business, if he so desires, shall have priority over other Public Business except Starred Questions.
 - (4) On all sitting days except Wednesdays, notices and orders relating to Public Bills, Measures, Affirmative Instruments and reports from Select Committees of the House shall have precedence over other notices and orders save the foregoing.
 - (5) On Wednesdays, notices of Motions shall have precedence over notices and orders relating to Public Bills, Measures and delegated legislation.
 - (6) Any motion relating to a report from the Delegated Powers and Regulatory Reform Committee on a draft order laid under section 1 of the Deregulation and Contracting Out Act 1994 or on a draft order laid under the Regulatory Reform Act 2001 shall be entered before a motion to approve that draft order.

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- (7) Subject to paragraphs (4), (5) and (6) the precedence of notices and orders relating to Public Bills, Measures, Affirmative Instruments and reports from Select Committees of the House may be varied on any day, if the convenience of the House so requires.
- (8) Unstarred Questions shall be entered last.
- 72(1)** No Motion for a resolution of the House to approve an Affirmative Instrument shall be moved until:
- (a) except in the case of any Order in Council or draft Order in Council made or proposed to be made under paragraph 1 of Schedule 1 to the Northern Ireland Act 1974, or a draft order proposed to be made under section 1 of the Deregulation and Contracting Out Act 1994, or a draft remedial order or remedial order laid under Schedule 2 to the Human Rights Act 1998, or a draft order proposed to be made under section 1 of the Regulatory Reform Act 2001, there has been laid before the House the report thereon of the Joint Committee on Statutory Instruments;
 - (b) in the case of a draft order proposed to be made under section 1 of the Deregulation and Contracting Out Act 1994, or a draft order proposed to be made under section 1 of the Regulatory Reform Act 2001, there has been laid before the House the report thereon of the Delegated Powers and Regulatory Reform Committee; and
 - (c) in the case of a draft remedial order or remedial order laid under Schedule 2 to the Human Rights Act 1998, there has been laid before the House the report thereon of the Joint Committee on Human Rights:

Provided that the report is laid

- (i) in the case of a draft remedial order, within 60 days of the laying of the draft order or
 - (ii) in the case of an order not approved in draft, within 119 days of the making of the original order,
- such periods to be calculated in the manner prescribed by Schedule 2 to the Act; and
- (d) in the case of a Hybrid Instrument, the proceedings under Private Business Standing Order 216 or 216A have been terminated.
- (2) In this Standing Order "Affirmative Instrument" means an Order in Council, departmental order, rules, regulations, scheme or other similar instrument presented to or laid or laid in draft before the House where an affirmative resolution is required before it, or any part of it, becomes effective, or is made, or is a condition of its continuance in operation: but the expression does not include a Measure laid before the House under the Church of England Assembly (Powers) Act 1919 nor regulations made under the Emergency Powers Act 1920.
- (3) An Order in Council that may not be made except in response to an address by the House to Her Majesty is an Affirmative Instrument within the meaning of this Standing Order, and a Motion for an address to Her Majesty praying that an order be made is a Motion to approve the order.
- (4) An order, rules, regulations, scheme or instrument laid in draft before the House for the purpose of being approved by resolution of the House is an Affirmative Instrument within the meaning of this Standing Order notwithstanding that, if the draft is not approved, that instrument is subject to annulment in pursuance of a resolution of either House.

ANNEX B: LIST OF DEREGULATION ORDERS

Note: paragraphs 9, 10, 62, 72 and 121 of the Explanatory Notes refer.

1. The Deregulation (Greyhound Racing) Order 1995 (SI N^o: 1995/3231) permitted inter-track betting for greyhound racing. Estimated to increase the greyhound industry's gross income by £2-3 million a year.
2. The Deregulation (Building Societies) Order 1995 (SI N^o: 1995/3233) contained a number of measures, including increasing to 50% the percentage limit on societies' non-retail funds. Estimated to save the industry £400,000 a year for each point the wholesale interest rate is below the retail interest rate.
3. The Deregulation (Fair Trading Act 1973) (Amendment) (Merger Reference Time Limits) Order 1996 (SI N^o: 1996/345) shortened deadlines for referring mergers to the Director General of Fair Trading.
4. The Deregulation (Restrictive Trade Practices Act 1976) (Amendment) (Variation of Exempt Agreements) Order 1996 (SI N^o: 1996/346) removed the requirement for advance clearance by the Director General of Fair Trading of variations to certain agreements. Estimated to save industry £100,000 a year.
5. The Deregulation (Restrictive Trade Practices Act 1976) (Amendment) (Time Limits) Order 1996 (SI N^o: 1996/347) simplified time limits for notification of agreements to the Director General of Fair Trading.
6. The Deregulation (Corn Returns Act 1882) Order 1996 (SI N^o: 1996/848) allowed exemptions to the requirement for purchasers of corn to make weekly returns. Estimated to save the industry £100,000 a year.
7. The Deregulation (Length of School Day) Order 1996 (SI N^o: 1996/951) removed restrictions on the procedure for changing the length of the school day.
8. The Deregulation (Special Hours Certificates) Order 1996 (SI N^o: 1996/977) introduced provisional special hours licensing certificates.
9. The Deregulation (Friendly Societies Act 1992) Order 1996 (SI N^o: 1996/1188) contained a number of measures, including removing some regulatory and accounting requirements for friendly societies.
10. The Deregulation (Credit Unions) Order 1996 (SI N^o: 1996/1189) contained a number of measures, including extending the maximum amount that members of credit unions can borrow and hold in shares.
11. The Deregulation (Salmon Fisheries (Scotland) Act 1868) Order 1996 (SI N^o: 1996/1211(S.122)) permitted the sale of farmed salmon roe. Estimated to give the Scottish salmon industry access to markets worth £12 million a year.
12. The Deregulation (Long Pull) Order 1996 (SI N^o: 1996/1339) abolished the "long pull" offence, which prohibited publicans from serving more alcohol than requested.
13. The Deregulation (Gaming Machines and Betting Office Facilities) Order 1996 (SI N^o: 1996/1359) contained a number of measures, including permitting jackpot machines to give all-cash prizes (rather than just tokens) and permitting a greater number of gaming machines in casinos and bingo clubs. Estimated to save the industry £7 million a year through reduced fraud and administration.
14. The Deregulation (Resolutions of Private Companies) Order 1996 (SI N^o: 1996/1471) removed the requirement for private companies to consult auditors in written resolution procedures.

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15. The Deregulation (Parking Equipment) Order 1996 (SI N^o. 1996/1553) abolished the requirement for type approval of parking control equipment. Estimated to save central and local government £70,000 a year in administration costs.
16. The Deregulation (Gun Barrel Proving) Order 1996 (SI N^o. 1996/1576) allowed Proof Houses (which prove and mark civilian small arms) to set their own prices.
17. The Deregulation (Motor Vehicles Tests) Order 1996 (SI N^o. 1996/1700) allowed a car's first MOT certificate to run for 13 months. Estimated to save the public over £3 million a year.
18. The Deregulation (Industrial and Provident Societies) Order 1996 (SI N^o. 1996/1738) contained a number of measures, including aligning the audit requirement thresholds for industrial and provident societies with those of private companies. Estimated to save £3 million a year.
19. The Deregulation (Wireless Telegraphy) Order 1996 (SI N^o. 1996/1864) abolished the requirements for TV dealers to hold TV licences and to register with the BBC. Estimated to save TV dealers £10,000 a year.
20. The Deregulation (Building) (Initial Notices and Final Certificates) Order 1996 (SI N^o. 1996/1905) reduced paperwork requirements and restrictions for approved building inspectors. Estimated to reduce approved building inspectors' costs by up to £61,000 a year.
21. The Deregulation (Insurance Companies Act 1982) Order 1996 (SI N^o. 1996/2102) contained a number of measures, including abolishing the requirement for production of five yearly statements of business and permitting annual returns to be made electronically. All measures taken together estimated to save the industry £6 million every five years.
22. The Deregulation (Slaughterhouses Act 1974 and Slaughter of Animals (Scotland) Act 1980) Order 1996 (SI N^o. 1996/2235) contained a number of measures, including removing duplicatory requirements for the licensing of slaughterhouses. Estimated to save the industry £100,000 a year.
23. The Deregulation (Still-Birth and Death Registration) Order 1996 (SI N^o. 1996/2395) permitted notification of death to any registrar (not just the registrar in the locality where the death occurred). Estimated to produce few monetary savings but to reduce the emotional burden significantly.
24. The Deregulation (Bills of Exchange) Order 1996 (SI N^o. 1996/2993) contained a number of measures including permitting the electronic presentation of cheques. Estimated to save the banking industry £30 million a year.
25. The Deregulation (Rag Flock and other Filling Materials Act 1951) (Repeal) Order 1996 (SI N^o. 1996/3097) repealed the 1951 Act. Estimated to save the upholstery industry £8,000 a year in compliance costs.
26. The Deregulation (Casinos) Order 1997 (SI N^o. 1997/950) reduced the required time lapse between a new member of a casino club joining the club and being permitted to participate in gaming and allowed special hours certificates to be issued for casinos.
27. The Deregulation (Employment in Bars) Order 1997 (SI N^o. 1997/957) permitted people aged under 18 on approved apprenticeship schemes to serve in bars.
28. The Deregulation (Gaming on Sunday in Scotland) Order 1997 (SI N^o. 1997/941 (S.83)) brought Sunday opening hours for bingo clubs and casinos in Scotland into line with those in England & Wales.

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29. The Deregulation (Betting Licensing) Order 1997 (SI N^o. 1997/947) extended the validity of betting office licences. Estimated to save the industry £450,000 a year.
30. The Deregulation (Validity of Civil Preliminaries to Marriage) Order 1997 (SI N^o. 1997/986) allowed bookings for weddings at registry offices to be made up to twelve months in advance instead of only three.
31. The Deregulation (Occasional Permissions) Order 1997 (SI N^o. 1997/1133) increased from four to twelve the number of occasional permissions to sell alcohol available each year to non-profit making organisations.
32. The Deregulation (Provision of School Action Plans) Order 1997 (SI N^o. 1997/1142) permitted failing schools to issue a summary of the statement of their proposed action to all parents, rather than issuing the full statement.
33. The Deregulation (Football Pools) Order 1997 (SI N^o. 1997/1073) removed the restriction on pools betting on midweek football matches.
34. The Deregulation (Betting and Bingo Advertising etc.) Order 1997 (SI N^o. 1997/1074) removed some advertising restrictions on bingo clubs.
35. The Deregulation (Casinos and Bingo Clubs: Debit Cards) Order 1997 (SI N^o. 1997/1075) allowed debit cards to be used in casinos and bingo clubs.
36. The Deregulation (Non-Fossil Fuel) Order 1997 (SI N^o. 1997/1185) allowed suppliers of electricity other than that which is connected to the national grid to qualify for the Fossil Fuel Levy.
37. The Deregulation (Public Health Acts Amendment Act 1907) Order 1997 (SI N^o. 1997/1187) removed duplicatory requirements for licensing of pleasure boats.
38. The Deregulation (Licence Transfers) Order 1998 (SI N^o. 1998/114) streamlined licence transfer procedures.
39. The Deregulation (Deduction from Pay of Union Subscriptions) Order 1998 (SI N^o. 1998/1529), also known as the Check Off Order, removed the need for 3-yearly re-authorisation of deduction of trade union subscriptions from pay.
40. The Deregulation (Methylated Spirits Sale By Retail) (Scotland) Order 1998 (SI N^o. 1998/1602 (S.87)) removed requirements imposed on retailers selling methylated spirits in Scotland.
41. The Deregulation (Exchangeable Driving Licences) Order 1998 (SI N^o. 1998/1917) recognised some non-UK driving licences as valid for the purposes of driving in the UK.
42. The Deregulation (Taxis and Private Hire Vehicles) Order 1998 (SI N^o. 1998/1946) permitted holders of Northern Ireland driving licences to be granted a licence to drive a private hire vehicle or taxi in England (excluding London) and Wales, putting them on an equal footing with holders of Great Britain and European driving licences.
43. The Deregulation (Weights and Measures) Order 1999 (SI N^o. 1999/503) allowed self verification of weighing and measuring equipment by manufacturers, installers and repairers.
44. The Deregulation (Pipe-lines) Order 1999 (SI N^o. 1999/742) removed the need for consent of the Secretary of State for the Environment, Transport and the Regions for certain matters relating to the construction of pipe-lines.

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

45. The Deregulation (Casinos) Order 1999 (SI N^o. 1999/2136) reduced further the required time lapse between a new member of a casino club joining the club and being permitted to participate in gaming (previously addressed by the Deregulation (Casinos) Order 1997 (SI no. 1997/950)).
46. The Deregulation (Millennium Licensing) Order 1999 (SI N^o. 1999/2137) relaxed the restrictions on opening hours of licensed premises over Millennium Eve.
47. The Deregulation (Sunday Dancing) Order 2000 (SI N^o. 2000/3372) allows public dances held on Sundays to charge an admission fee.
48. The Deregulation (Sunday Licensing) Order 2001 (SI N^o. 2001/920) allows licensed premises to apply on Sundays for an extension to the time they can sell or serve alcohol beyond the permitted hour of 10.30pm on Sundays.

Proposals for deregulation orders laid before Parliament for scrutiny before the passing of the Regulatory Reform Act:

49. Proposal for the Draft Deregulation (Disposals of Dwelling-Houses by Local Authorities) Order 2001
50. Proposal for the Draft Deregulation (Correction of Birth and Death Entries in Registers or other Records) Order 2001
51. Proposal for the Draft Deregulation (Bingo and Other Gaming) Order 2001
52. Proposal for the Deregulation (Restaurant Licensing Hours) Order 2001

ANNEX C: GOVERNMENT COMMITMENTS

Note: paragraphs 15 and 17 of the Explanatory Notes refer.

DURING DEBATE IN THE HOUSE OF LORDS

Adverse Committee Reports

Lord McIntosh of Haringey (21 Dec 2000 : Column 899): But it gives me the opportunity to repeat the assurance given by my noble and learned friend in May of last year¹⁹. At that time the Government undertook to continue to respect the convention that no measure under the Deregulation and Contracting Out Act should be forced through in the face of the committee's opposition. The noble Lord, Lord Goodhart, and the noble Viscounts, Lord Goschen and Lord Bridgeman, asked for that assurance and I am happy to repeat the undertaking today.

Companion Motions in House of Lords

Lord McIntosh of Haringey (25 Jan 2001: Column 371): As my noble and learned friend Lord Falconer pointed out in our debate on Tuesday last [*we cannot find any reference to this*], there is a government undertaking that, in the event of a Motion amending a draft deregulation order being agreed by the House, the Motion for the draft order would not be moved. That was agreed by the previous government on 20th October 1994 and this Government have confirmed it.

As the noble Lord, Lord Phillips, remarked, in its 15th report, last Session, the Delegated Powers and Deregulation Committee drew,

"attention to the Government undertaking that, in the event of a motion hostile to a draft deregulation order being agreed to by the House of Lords, the motion for the draft order would not be moved. In oral evidence Lord Falconer accepted that ... if a motion hostile to a draft order were agreed to the Government would have to start the order-making process again from scratch (Q 64). This is clearly the strongest ultimate safeguard".

Report on Operation of Act

Lord Falconer of Thoroton (13 Feb 2001: Column 215): However, I can and do undertake on behalf of the Government that a Minister of the Crown will report to this House three years after enactment--I say three years rather than two years; I am not sure that that is a critical point between us--on the operation of the regulatory format should it become an Act. I undertake that that report will cover the operation of the order-making process and any associated constitutional and procedural issues. As the debates to date have indicated, these are areas of key concern to your Lordships' House. It is right that the government of the day should address them fully. After that first report, it would be for the government of the day and the House to decide on the need for any further report. The timing, scale and scope of the next report seems to me a matter best decided after that. I do not think that it would be right for such reports to reopen matters of policy which had been debated fully during the consultation, scrutiny and approval stage of the order-making process. There would be no point if a reformed regulatory regime order was working smoothly. Indeed, it could cause uncertainty. But the process--how the system is working--needs to be looked at.

Commitments on Large and Controversial Measures

Lord Falconer of Thoroton (21 Dec 2000 : Column 852): We intend preserving the strengths of the existing deregulation process. First, thorough and effective consultation will remain the gateway to the order-making process; secondly, the two Houses would be true co-equals in the scrutiny process--highly controversial or party-political measures will naturally remain more suited to debate on the Floor of the House; and, thirdly, the rigours of the scrutiny process will also be preserved and enhanced.

¹⁹ Lord Falconer re-affirmed this intention in his evidence to the Delegated Powers and Deregulation Committee as cited in its 15th Report (HL 61 of the 1999/2000 session).

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

Lord Falconer of Thoroton (23 Jan 2001 : Column 209): We have made it clear at all stages that we are dealing with orders that are not politically controversial, although there may be controversy about the detail. If they were politically controversial to a serious extent, that would not be appropriate for a regulatory reform order. We are discussing matters that would otherwise have to be dealt with in primary legislation, although it would be difficult to find time in legislative programmes, which are often crowded. I am more than happy to agree; yes, the orders would need to be passed by both Houses. If an order was not passed by the House of Lords, it would not get through.

Lord Falconer of Thoroton (13 Feb 2001 : Column 186): As has been repeatedly stated by everyone involved, the power in the Bill is not suited to large and controversial measures. The entire procedure contained in the Bill would weed out such proposals. A highly contentious issue would come up against serious problems during the consultation period and the Minister, obliged to set all this out in the document he placed before Parliament, would have to reflect that explicitly. The scrutiny procedures in Parliament, involving careful examination by committees and the co-equal status of the two Houses, are such that any Minister would obviously be ill-advised to choose this route.

DURING DEBATE IN THE HOUSE OF COMMONS

Mr Stringer, the Parliamentary Secretary at the Cabinet Office, repeated three of these assurances at 2nd Reading (House of Commons Hansard, 19 March 2001, Col. 117:

I am delighted to repeat those commitments, which the hon. Member for Weston-super-Mare (Mr. Cotter) asked me to reiterate. First, I am happy to confirm that the order-making power will not be used for large and controversial measures. Secondly, the Government would not proceed with an order against the Committee's wishes. Thirdly, the Government will report in three years' time on the procedural workings and constitutional implications of the power.

ANNEX D: LIST OF POTENTIAL REGULATORY REFORM ORDERS

Note: paragraph 18 of the Explanatory Notes refers.

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

Items highlighted in **bold** are the subject of proposals for deregulation orders, and those highlighted in **bold and italics** are the subject of consultation on proposals for regulatory reform orders.

1. Building Regulations (DETR)
2. ***Business tenancies (DETR) – see [paragraph 11](#) above for details of consultation document***
3. Disposal of land at less than best price (DETR)
4. Environment Agency legislative review (DETR)
5. ***Grants and loans for the renewal of private sector housing (DETR) – see [paragraph 11](#) above for details of consultation document***
6. **Housing Transfers (DETR) – see Annex B for draft deregulation order**
7. ***Landlord and Tenant Act s.57 (DETR) – see [paragraph 11](#) above for details of consultation document***
8. Orders removing exemptions from caravan site licensing (DETR)
9. Road Traffic Regulation (DETR)
10. Tree Preservation Order System (DETR)
11. After-hours childcare at schools (DfEE)
12. Approving a LEA's curriculum complaints procedures (DfEE)
13. ***Voluntary aided schools capital funding arrangements (DfEE) – see [paragraph 12](#) above for details of consultation document***
14. Dental services - provision by corporate bodies (DoH)
15. Medicine Licences (DoH)
16. NHS Accounting for charitable funds (DoH)
17. Public Health Legislation – communicable disease (DoH)
18. Invalid Care Allowance (DSS)
19. Vaccine Damage Payments Scheme (DSS)
20. ***Abolition of 20 partner limit (DTI) – see [paragraph 11](#) above for details of consultation document***
21. Reform of Unsolicited Goods and Service Act (DTI)
22. Repeal of Trading Stamps Act (DTI)
23. Unfair contract terms (DTI)
24. Weights & measures (DTI)
25. DVLA links with Benefit Agency (DVLA)

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

26. DVLA/Passport Agency Data Links (DVLA)
27. Vehicle Crime Reduction - Seriously Damaged Vehicle Information Hot Line and Mandatory Mileage Recording (DVLA)
28. Fire safety (Home Office)
29. **Gaming Machines (Home Office) – see [paragraph 11](#) above for details of details of consultation document**
30. **New Years Eve deregulation (Home Office) – see [paragraph 11](#) above for details of consultation document**
31. **Reform of Gambling – Bingo (Home Office) – see Annex B for draft deregulation order**
32. Rehabilitation of offenders – cautions, reprimands and final warnings (Home Office)
33. **Restaurant licensing hours (Home Office) – see Annex B for draft deregulation order**
34. Sexual Offences and access to victim material (Home Office)
35. Street Trading (Home Office)
36. Reform of charity law (Home Office/Charity Commission)
37. Bootleggers - Disclosure of names (HM Customs and Excise)
38. National Insurance Contributions - Third party awards to employees (HM Inland Revenue)
39. Attachment of Earnings (LCD)
40. Legal Services Ombudsman - personal signature (LCD)
41. Solicitors Act 1974 (LCD)
42. Vexatious Litigants (LCD)
43. Disclosure of information by MAFF to HSE (MAFF)
44. Home Grown Cereals Authority: Approval by Ministers of pensions and gratuities and arrangements for maintaining pension schemes (MAFF)
45. Home Grown Cereals Authority: Approval by the Treasury of remuneration for advisory committee members (MAFF)
46. Home Grown Cereals Authority: Corn Returns (MAFF)
47. Meat and Livestock Commission - extension of powers (MAFF)
48. **Births and Deaths– errors on certificates (ONS/HMT) – see Annex B for draft deregulation order**
49. Births and Deaths - Wales (ONS)
50. Reform of Civil Registration Service (ONS)
51. Copyright and Patents (Patent Office)

ANNEX E: ADVICE TO DEPARTMENTS

Note: paragraph 22 of the Explanatory Notes refers.

CONSULTATION : REGULATORY REFORM ORDERS

Purpose

- Proposals for orders have to undergo extensive public consultation, in order to elicit evidence without which the proposal cannot legally go ahead. Each consultation document should:

set out the proposal against the tests and safeguards in the order-making process (see the handout on “What Regulatory Reform Orders can do...”), in such a way that the intended audience can readily supply the information that the Minister needs in order to satisfy himself and the scrutiny Committees that the proposal meets those tests and safeguards. This would be best achieved by following the structure set out in section 6(2) of the Act;

explain clearly and comprehensibly the policy on which views are being sought, including the implications for the devolved administrations (see the handout on “Regulatory Reform Orders and devolution”).

These aims may result in a longer consultation document than would otherwise be the case with a straightforward consultation document. A sensible approach would be to break the document up into manageable sections, given the need for comprehensibility and so that only those interested need to go into the detail.

- Each consultation document should also:
 - where the proposals are fairly fully developed, include draft legislation or at least reflect what the legislation will say; and
 - seek additional information where needed to develop the policy and to flesh out the Regulatory Impact Assessment (RIA) as required under by Good Policy Making: A Guide to Regulatory Impact Assessment.
- Each consultation exercise should be carried out in accordance with the Code of Practice on Written Consultation issued by the Cabinet Office. There is advice on best practice at www.consultation.gov.uk.

THOROUGHNESS OF CONSULTATION

The scrutiny Committee in each House will assess whether or not the consultation process was properly conducted and therefore whether the draft order should proceed. You should therefore consider your proposition against the following questions:

1.

DID THE CONSULTATION EXERCISE ADDRESS THE RELEVANT ISSUES?

- Each consultation on a prospective RRO needs to elicit all the information needed to complete the Explanatory Document that the Minister must lay alongside the proposed order. The consultation responses will need to provide evidence to support any assertions. And you are strongly advised to structure your consultation document to follow the list of matters at section 6(2) of the Act;
- You need to address at an early stage the implications of the three devolution settlements for your policy proposals. These should be reflected in the consultation document. You should discuss the issues at an early stage with the devolved administrations (see the handout on “Regulatory Reform Orders and devolution”).

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

- One outcome from the consultation process should be clarity as to the extent of the proposal's controversiality – you should note that issues that are highly charged or politically very controversial are better suited to the floor of the House.
- 2.

WAS THE CONSULTATION PERIOD SUFFICIENT?

- The Code of Practice lays down a standard minimum period of twelve weeks for a consultation. It also recognises that there will be circumstances that unavoidably require a shorter period and/or where urgency is in the public interest.
 - While urgency is unlikely in the case of RROs, the consultation document should state the reasons for departing from the Code and what special measures (eg advance notice of at least the broad issues to be covered) have been taken to ensure that consultation is nevertheless as effective as possible.
- 3.

WHO WAS CONSULTED?

- The scrutiny Committees will pay special attention to the inclusiveness of the consultation process, such as the extent to which it captured the views of those who might be adversely affected, whether directly or indirectly, by the proposal.
 - The emphasis should therefore be on a wide distribution, covering representative bodies, consumer bodies, trades unions, employers' representatives (including representatives of small business, and the SBS) and other likely interest groups.
 - The document should be expressed in a way that all these different interests can understand. It must include sufficient background material in order for a newcomer to understand the proposal. It should not assume any prior knowledge.
 - The Act contains specific other consultation requirements in relation to Wales and the Law Commissions.
- 4.

HOW WERE PEOPLE CONSULTED?

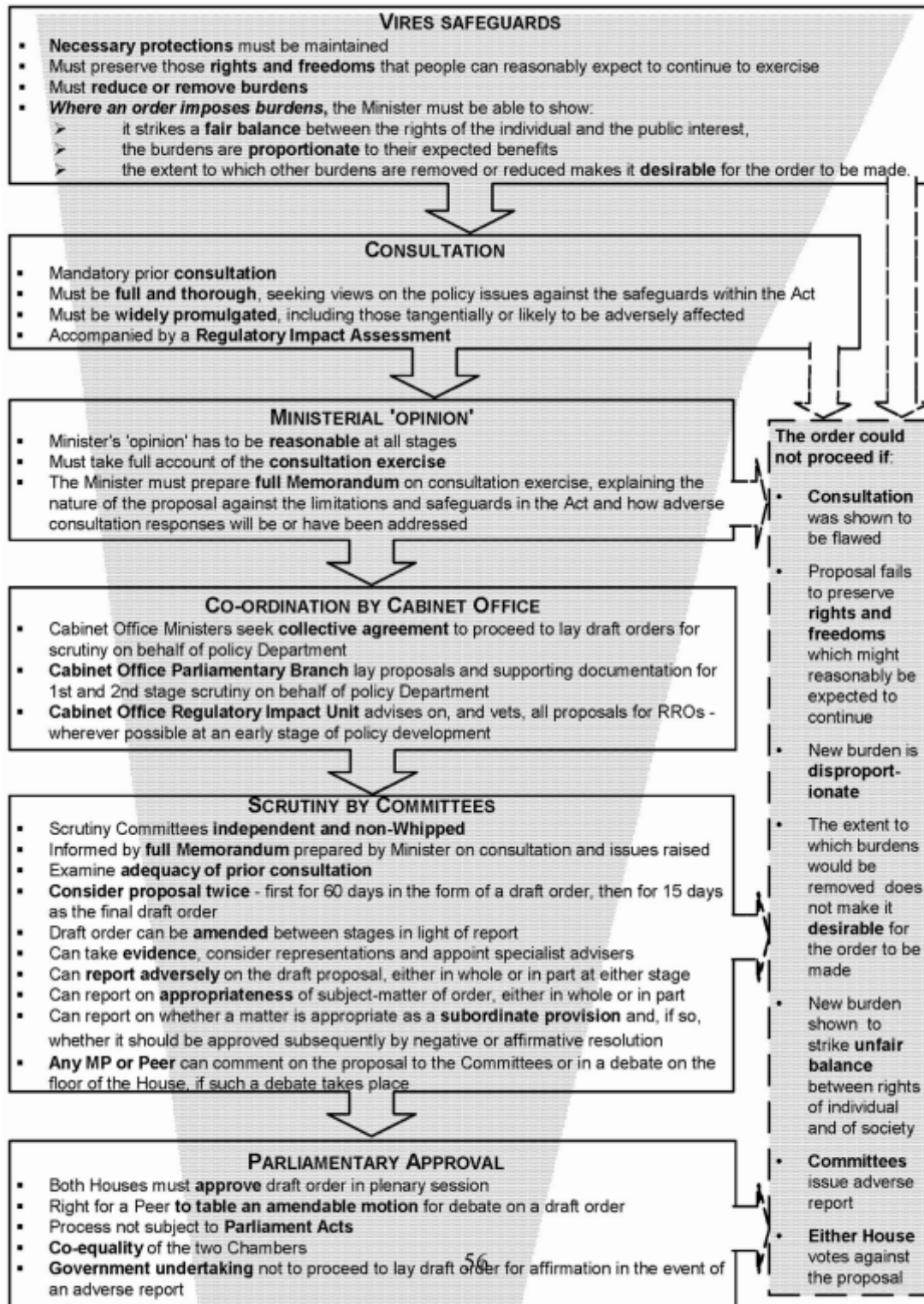
- The consultation exercise will normally involve the production of a written consultation document, which must be published simultaneously on the Department's website, on the RIU website at www.cabinet-office.gov.uk/regulation and on the UKOnline site at www.ukonline.gov.uk.
- Where a written consultation document is unlikely to reach those affected by the proposal or with an interest in it, the scrutiny committees will look carefully at what steps were taken to elicit their views, such as research, surveys and focus groups.

PROCEDURAL MATTERS

- The draft consultation document must be cleared with Regulatory Impact Unit (RIU) in Cabinet Office and RIU lawyers.
- You must get collective agreement from Cabinet Committees before issuing your consultation document (usually HS or EA and LP).
- 55 copies of the consultation document should be sent to RIU prior to issue for onward transmission to the scrutiny Committees in both Houses of Parliament.

ANNEX F: OVERVIEW OF PROCEDURAL AND LEGAL SAFEGUARDS

Note: paragraph 23 of the Explanatory Notes refers.



ANNEX G: TEXT OF THE ENFORCEMENT CONCORDAT

Note: paragraph 24 of the Explanatory Notes refers.

THE PRINCIPLES OF GOOD ENFORCEMENT: POLICY AND PROCEDURES

This document sets out what business and others being regulated can expect from enforcement officers. It commits us to good enforcement policies and procedures. It may be supplemented by additional statements of enforcement policy.

The primary function of central and local government enforcement work is to protect the public, the environment and groups such as consumers and workers. At the same time, carrying out enforcement functions in an equitable, practical and consistent manner helps to promote a thriving national and local economy. We are committed to these aims and to maintaining a fair and safe trading environment.

The effectiveness of legislation in protecting consumers or sectors in society depends crucially on the compliance of those regulated. We recognise that most businesses want to comply with the law. We will, therefore, take care to help business and others meet their legal obligations without unnecessary expense, while taking firm action, including prosecution where appropriate, against those who flout the law or act irresponsibly. All citizens will reap the benefits of this policy through better information, choice, and safety.

We have therefore adopted the central and local government Concordat on Good Enforcement. Included in the term “enforcement” are advisory visits and assisting with compliance as well as licensing and formal enforcement action. By adopting the concordat we commit ourselves to the following policies and procedures, which contribute to best value, and will provide information to show that we are observing them.

PRINCIPLES OF GOOD ENFORCEMENT: POLICY

Standards

In consultation with business and other relevant interested parties, including technical experts where appropriate, we will draw up clear standards setting out the level of service and performance the public and business people can expect to receive. We will publish these standards and our annual performance against them. The standards will be made available to businesses and others who are regulated.

Openness

We will provide information and advice in plain language on the rules that we apply and will disseminate this as widely as possible. We will be open about how we set about our work, including any charges that we set, consulting business, voluntary organisations, charities, consumers and workforce representatives. We will discuss general issues, specific compliance failures or problems with anyone experiencing difficulties.

Helpfulness

We believe that prevention is better than cure and that our role therefore involves actively working with business, especially small and medium sized businesses, to advise on and assist with compliance. We will provide a courteous and efficient service and our staff will identify themselves by name. We will provide a contact point and telephone number for further dealings with us and we will encourage business to seek advice /information from us. Applications for approval of establishments, licenses, registrations, etc, will be dealt with efficiently and promptly. We will ensure that, wherever practicable, our enforcement services are effectively co-ordinated to minimise unnecessary overlaps and time delays.

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

Complaints about service

We will provide well publicised, effective and timely complaints procedures easily accessible to business, the public, employees and consumer groups. In cases where disputes cannot be resolved, any right of complaint or appeal will be explained, with details of the process and the likely time-scales involved.

Proportionality

We will minimise the costs of compliance for business by ensuring that any action we require is proportionate to the risks. As far as the law allows, we will take account of the circumstances of the case and the attitude of the operator when considering action.

We will take particular care to work with small businesses and voluntary and community organisations so that they can meet their legal obligations without unnecessary expense, where practicable.

Consistency

We will carry out our duties in a fair, equitable and consistent manner. While inspectors are expected to exercise judgement in individual cases, we will have arrangements in place to promote consistency, including effective arrangements for liaison with other authorities and enforcement bodies through schemes such as those operated by the Local Authorities Co-ordinating Body on Food and Trading Standards (LACOTS) and the Local Authority National Type Approval Confederation (LANTAC).

PRINCIPLES OF GOOD ENFORCEMENT: PROCEDURES

Advice from an officer will be put clearly and simply and will be confirmed in writing, on request, explaining why any remedial work is necessary and over what time-scale, and making sure that legal requirements are clearly distinguished from best practice advice.

Before formal enforcement action is taken, officers will provide an opportunity to discuss the circumstances of the case and, if possible, resolve points of difference, unless immediate action is required (for example, in the interests of health and safety or environmental protection or to prevent evidence being destroyed).

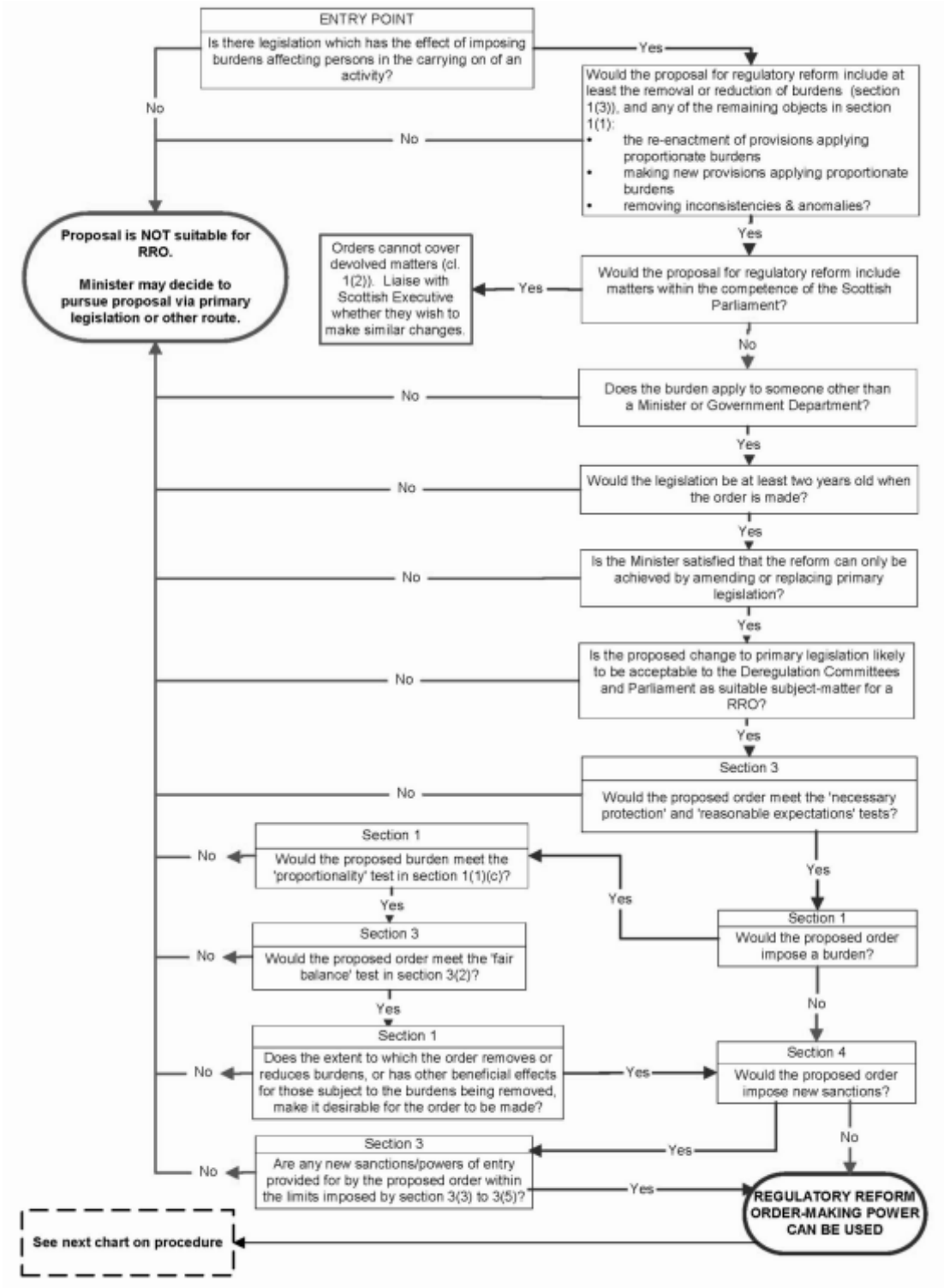
Where immediate action is considered necessary, an explanation of why such action was required will be given at the time and confirmed in writing in most cases within 5 working days and, in all cases, within 10 working days.

Where there are rights of appeal against formal action, advice on the appeal mechanism will be clearly set out in writing at the time the action is taken (whenever possible this advice will be issued with the enforcement notice).

March 1998

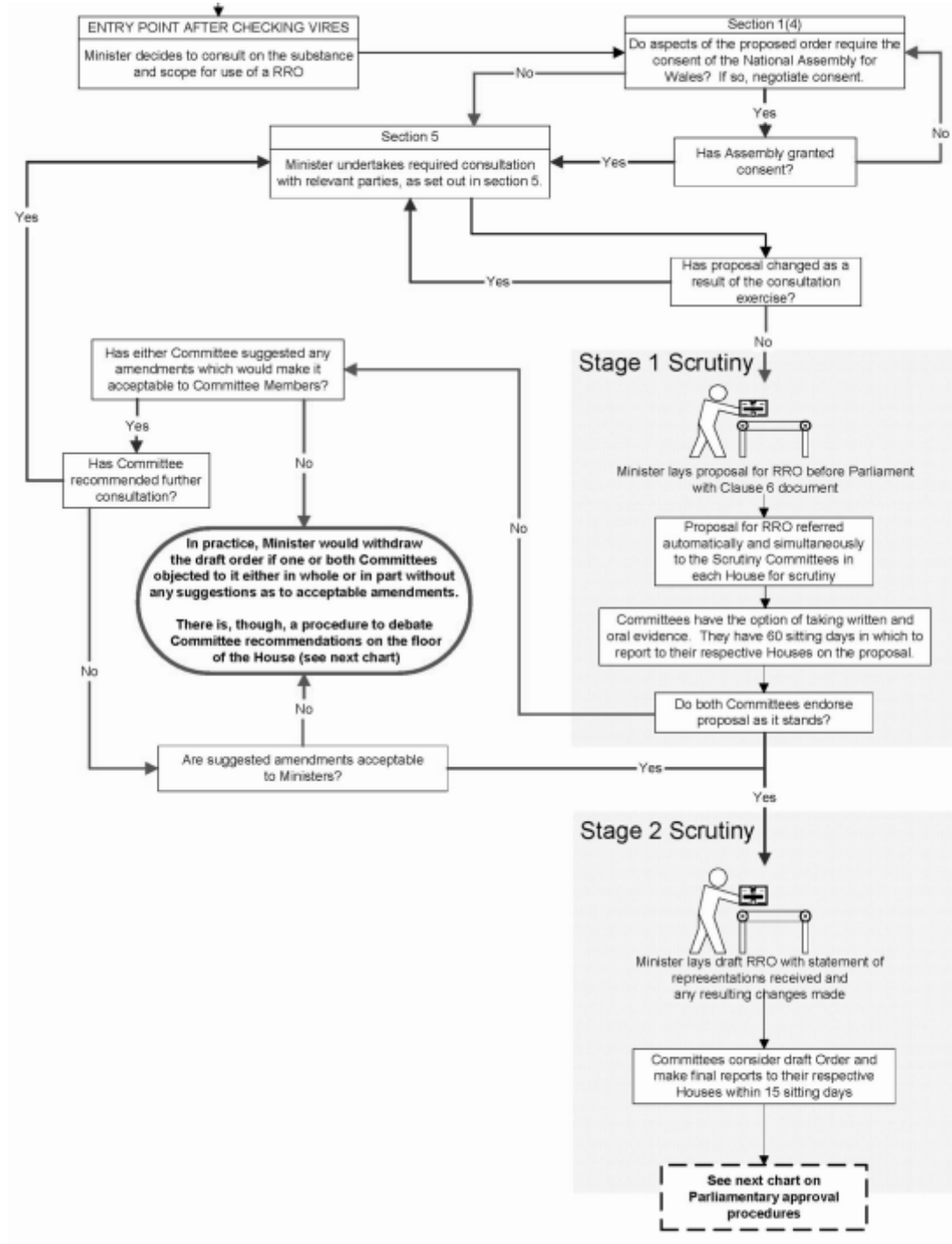
ANNEX H: REGULATORY REFORM ORDER-MAKING: INITIAL CHECK ON VIRES

Note: paragraph 33 of the Explanatory Notes refers.



ANNEX I: REGULATORY REFORM ORDER-MAKING: CONSULTATION AND COMMITTEE SCRUTINY

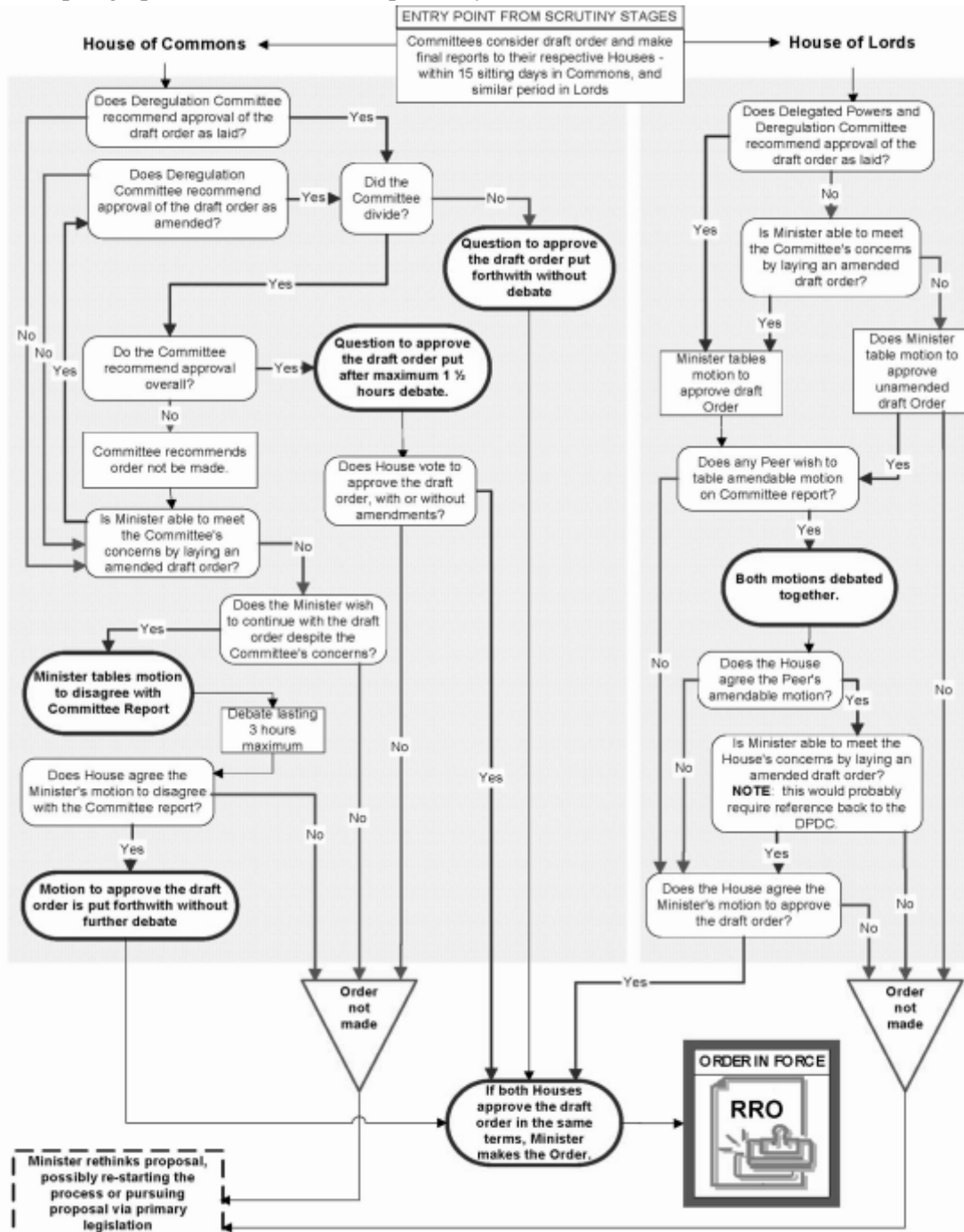
Note: paragraphs 33 and 47 of the Explanatory Notes refer.



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

ANNEX J: REGULATORY REFORM ORDER-MAKING: PARLIAMENTARY CONSIDERATION

Note: paragraphs 33 and 47 of the Explanatory Notes refer.



ANNEX K: REGULATORY REFORM PROPOSALS AND ORDERS - PARLIAMENTARY CONSIDERATION

Note: paragraph 93 of the Explanatory Notes refers.

NOTE FOR DEPARTMENTS

(Not for Publication in the Consultation Document):

The wording of this Annex has been agreed with the scrutiny Committees in both Houses of Parliament.

Apart from deleting this text box and inserting the relevant details where indicated by square brackets, Departments should not change the wording of this Annex in any way whatsoever.

INTRODUCTION

1. These reform proposals in relation to [xxxx] will require changes to primary legislation in order to give effect to them. The Minister could achieve these changes by introducing a Regulatory Reform Order under the Regulatory Reform Act 2001. Regulatory Reform Orders are subject to preliminary consultation and to extended Parliamentary scrutiny (by Committees in each House of Parliament) of any subsequently proposed Order. On that basis, the Minister invites comments on these reform proposals in relation to [xxx] as measures that might be carried forward by a Regulatory Reform Order.

REGULATORY REFORM PROPOSALS

2. This consultation document on [xxx] has been produced because the starting point for regulatory reform proposals is thorough and effective consultation with interested parties. In undertaking this preliminary consultation, the Minister is expected to seek out actively the views of those concerned, including those who may be adversely affected, and then to demonstrate to the Scrutiny Committees that he or she has addressed those concerns.
3. Following the consultation exercise, when the Minister lays proposals before Parliament under the Regulatory Reform Act, he or she must also lay a report for consideration by the Scrutiny Committees setting out a summary of:
 - the burden imposed by the existing law;
 - whether any of those burdens are proposed to be removed or reduced;
 - how the proposals otherwise further the other objects of the Regulatory Reform Act (re-enacting proportionate burdens, introducing new but proportionate burdens, removing inconsistencies and anomalies);
 - whether there is ‘necessary protection’ and how it is to be continued;
 - how any reasonable expectation of the exercise of rights or freedoms is affected (if at all) and how the exercise can be continued;
 - how new burdens (if any) are both proportionate and, taking the proposals as a whole, strike a fair balance between the public interest and the interests of the persons affected by the new burdens;
 - whether an Order that imposes burdens is desirable in terms either of the burdens it removes or the other benefits it brings;
 - whether any parts of the proposed Order are being designated as ‘subordinate provisions’, allowing them to be changed by less elaborate Parliamentary procedures in the future;
 - what cost savings or increases are expected, and why;

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

- what other benefits there will be from the proposals;
 - details of the consultation process;
 - any representations received as a result of that consultation; and
 - the changes made as a result.
4. On the day the Minister lays the proposals and report, the period for Parliamentary consideration begins. It lasts for 60 days, excluding Parliamentary recesses of more than four days. If you want a copy of the proposals and the Minister's report, you will be able to get them either from the Government department concerned or by visiting the Cabinet Office's website at <http://www.cabinet-office.gov.uk/regulation/act/index.htm>.

PARLIAMENTARY SCRUTINY

5. Both Houses of Parliament scrutinise regulatory reform proposals and draft orders. This is done by the Scrutiny Committees.
6. Standing Orders in the Commons stipulate that the Committee there considers whether proposals:
- (a) appear to make an inappropriate use of delegated legislation;
 - (b) remove or reduce a burden or the authorisation or requirement of a burden;
 - (c) continue any necessary protection;
 - (d) have been the subject of, and take appropriate account of, adequate consultation;
 - (e) impose a charge on the public revenues or contain provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribe the amount of any such charge or payment;
 - (f) purport to have retrospective effect;
 - (g) give rise to doubts whether they are *intra vires*;
 - (h) require elucidation, are not written in plain English, or appear to be defectively drafted; or
 - (i) appear to be incompatible with any obligation resulting from membership of the European Union;
 - (j) prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise;
 - (k) satisfy the conditions of proportionality between burdens and benefits set out in sections 1 and 3 of the Act;
 - (l) satisfy the test of desirability set out in section 3(2)(b) of the Act;
 - (m) have been the subject of, and take appropriate account of, estimates of increases or reductions in costs or other benefits which may result from their implementation; or
 - (n) include provisions to be designated in the draft order as subordinate provisions; and in the case of the latter consideration the committee shall report its opinion whether such a designation should be made, and to what parliamentary proceedings any subordinate provisions orders should be subject.
7. The Committee in the House of Lords will consider each proposal in terms of similar criteria, although these are not laid down in Standing Orders.

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

8. Each Committee might take oral or written evidence to help it decide these matters, and each Committee could then be expected to report:
- whether the Minister should proceed to lay a draft order in the same terms as the original proposal, or
 - whether amendment is necessary, or
 - whether the order-making power should not be used (for example, because of the significance or sensitivity of the proposal).

Copies of Committee Reports, as Parliamentary papers, can be obtained through HMSO. They are also made available on the Parliament website at

- <http://www.parliament.uk/commons/selcom/drghome.htm> for the Deregulation and Regulatory Reform Committee in the Commons; and
 - <http://www.parliament.the-stationery-office.co.uk/pa/ld/lddereg.htm> for the Delegated Powers and Regulatory Reform Committee in the Lords.
9. After the 60 days for Parliamentary consideration, the Minister can lay a draft order before both Houses, this time for the approval of Parliament.
10. Each of the Scrutiny Committees examines the draft order to see how far its views have been taken into account. They report, within 15 sitting days, whether the draft order should be approved or not, and it would then be for the relevant House itself to take its final decision.
11. The final draft order then has to be approved by both Houses of Parliament before becoming law.

HOW TO MAKE YOUR VIEWS KNOWN

12. Responding to this consultation document is your first and main opportunity to make your views known to the relevant department as part of the consultation process. You should send your views to the person named in the consultation document [in this case XXX]. When the Minister lays proposals before Parliament you are welcome to put your views before either or both of the Scrutiny Committees.
13. In the first instance, this should be in writing. The Committees will normally decide on the basis of written submissions whether to take oral evidence.
14. Your submission should be as concise as possible, and should focus on one or more of the criteria listed in paragraph 6 above.
15. The Scrutiny Committees appointed to scrutinise Regulatory Reform Orders can be contacted at:

Delegated Powers and Regulatory Reform Committee House of Lords London SW1A 0PW Tel: 0207 219 3103 Fax: 0207 219 2571 email: DPDC@parliament.uk	Deregulation and Regulatory Reform Committee House of Commons 7 Millbank London SW1P 3JA Tel: 020 7219 2830/2833/2837 Fax: 020 7219 2509 email: deregcom@parliament.uk
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NON-DISCLOSURE OF RESPONSES

16. [Section 7](#) of the Act provides what should happen when someone responding to the consultation exercise on a proposed order requests that their response should not be disclosed.
17. The name of the person who has made representations will always be disclosed to Parliament. If you ask for your representation not to be disclosed, the Minister should not disclose the content of that representation without your express consent and, if the representation relates to a third party, their consent too. Alternatively, the Minister may disclose the content of the representation in such a way as to preserve your anonymity and that of any third party involved.

INFORMATION ABOUT THIRD PARTIES

18. If you give information about a third party which the Minister believes may be damaging to the interests of that third party, the Minister does not have to pass on such information to Parliament if he does not believe it is true or he is unable to obtain the consent of the third party to disclosure. This applies whether or not you ask for your representation not to be disclosed.
19. The Scrutiny Committees may, however, be given access on request to all representations as originally submitted, as a safeguard against improper influence being brought to bear on Ministers in their formulation of regulatory reform orders.

REGULATORY IMPACT UNIT

Cabinet Office October 2001

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

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

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,

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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.

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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