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

COMMENTARY ON SECTIONS

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

"…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 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).