

REGULATORY REFORM ACT 2001

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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 JCHR¹.) 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

¹ <http://www.publications.parliament.uk/pa/jt200001/jtselect/jtrights/73/7312.htm>

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.