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

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 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 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 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).

- 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**).

- 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 of 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.

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.

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.

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.

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.

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).

66. However, difficulties that arise with some statutory provisions can only be resolved by providing for people to have express power to do things.

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).

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.

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 s*ubsection (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 Minster 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 extent 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 JCHR[1].) 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

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

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.

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 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 s*ubsection (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, s*ubsection (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 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.