

# LEGISLATIVE AND REGULATORY REFORM ACT 2006

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 1: Order-Making Powers**

##### **Powers**

##### *Section 1: Power to remove or reduce burdens*

18. **Section 1** confers power on a Minister of the Crown to make any provision by order which he considers would serve the purpose of removing or reducing any burden, or removing or reducing the overall burdens, to which any person is subject as a direct or indirect result of any legislation. Legislation is defined in subsection (6). The power is a broad one, and it is intended to be so. In the first place, it may be noted that the Minister may make “any” provision which would serve the purpose stated, subject only to the restrictions set out in the Act.
19. Subsection (3) defines a “burden” as:
  - a financial cost;
  - an administrative inconvenience;
  - an obstacle to efficiency, productivity or profitability; or
  - a sanction, criminal or otherwise, which affects the carrying on of any lawful activity.
20. *A financial cost*: this limb of the definition covers any financial costs, including administrative costs and policy or ‘compliance’ costs resulting from understanding and complying with legislation. So, for instance, section 1 could be used to reduce or remove the costs imposed on a business or a charity resulting from filling in health and safety forms required by legislation. It might be used to reduce or remove the costs resulting for a person from legislation of having to apply for a licence or consent. It could also be used to reduce the costs which result from making arrangements to avoid a situation where a criminal offence would be committed. In such a situation, to remove the sanction and repeal the underlying offence would be to reduce those costs.
21. *An administrative inconvenience*: this limb of the definition covers administrative inconvenience even where it does not result in a financial cost. For example, a requirement on an individual to fill in a form may not result in financial cost, but could be inconvenient for that person.
22. *An obstacle to efficiency, productivity or profitability*: in some cases legislation may not impose a cost on a person but may prevent them from being as efficient, productive or profitable as they would otherwise be.

23. “*Obstacle to efficiency*” could cover, for example, obstacles to the economically or administratively efficient exercise of a person’s or body’s existing statutory functions. This could include provisions in legislation which prevent a regulator from carrying out its functions of inspection or enforcement in a risk-based way, thus requiring the regulator to expend administrative effort and cost on low risk activities or operators, and preventing it targeting its resources at the high risk. (Note however that “efficiency” should be distinguished from “effectiveness”: it cannot be said to be an obstacle to “efficiency” that a person exercising certain statutory functions does not have other functions which might be desirable from a policy perspective, even if those other functions would make them more effective in achieving certain policy objectives.)
24. “*Obstacle to productivity*”: a tenancy restriction preventing farmers diversifying into non-agricultural activities to improve the viability of their business, might be an example of a bar on productivity. So an order could remove or reduce a restriction resulting from legislation that farmers may only use certain land for agricultural purposes.
25. Obstacles to competition, innovation, investment, skills or enterprise can constitute obstacles to productivity. Where a Minister is satisfied, on the basis of relevant evidence that such an obstacle is an obstacle to productivity, then this limb of the definition of burden would cover it. For instance, if legislation currently limits the patenting of goods to certain classes of product, and if the Minister were satisfied that extending those classes to include a new class of goods would remove an obstacle to innovation which was an obstacle to productivity, extending those limits would be possible under this section.
26. “*Obstacle to profitability*”: this limb of the definition could cover the *opportunity costs* of complying with legislation, for example, where compliance with the legislation means the loss of a financial benefit that could otherwise have been obtained. Restrictions on selling alcohol, or on Sunday trading might in principle be examples of obstacles to profitability. So for example an order could remove or reduce restrictions on the sale of methylated spirits on a Sunday. There are no actual costs imposed upon a business when it is prohibited from trading such spirits on a Sunday, only a loss of profit as a result of the ban.
27. *A sanction which affects the carrying on of any lawful activity*: this limb of the definition covers sanctions, criminal or otherwise, which affect the carrying on of a lawful activity. This could include a criminal sanction which affects the carrying on of an activity which is itself lawful, such as supplying financial services. It could not include sanctions for activities which are themselves unlawful, such as dealing in class A drugs, or people trafficking. So an order could remove or reduce criminal sanctions which relate to the carrying on of a particular lawful activity, but not sanctions relating to offences under the general criminal law. It is therefore possible by order to reduce the sanction for a particular criminal offence where it is no longer considered to be targeted or appropriate, for example by replacing the sanction of a term of imprisonment with a fine.
28. The reference in subsection (2) to "removing or reducing the overall burdens" is intended to allow for one statutory regime to be replaced by another which is less burdensome overall for a person. This means that existing burdens can be increased, or a new burden could be imposed, where this is for the purpose of reducing the overall burdens resulting from legislation to which a person is subject.
29. The power enables a Minister to make an order which he considers would serve the purpose of removing or reducing a burden for *a person*. The Minister must therefore consider that there is a person for whom, comparing the position before and after the order has been made, a burden, or the overall burdens, will have been removed or reduced.
30. The burden must *result from legislation*. So an order cannot make provision to reduce costs, unless those costs result from legislation (as defined in subsection (6)). The power

in section 1 can therefore only be used to reform an area where there is already a legislative framework. It could be used to replace one statutory regime with another where this removes or reduces burdens, but it cannot be used to introduce an entirely new regulatory regime. So, for example, it would not be possible to create an entirely new legislative framework relating to a new area of consumer protection, employment rights or environmental protection simply because there are considered to be good policy reasons for doing so.

31. The burden may, however, be the direct *or indirect* result of legislation. An example of a direct burden resulting from legislation would be the costs incurred directly by a regulated business as a result of complying with legislation. An example of an indirect cost would be the costs such a business were to pass on in the form of higher prices to its customers as a result.
32. It is possible under section 1 to remove or reduce a burden for one person and in so doing *impose or increase a burden for another*, but only if the increase is the *result* of the removal or reduction of a burden on a person. So for instance it would be possible by order under section 1 to remove from those being regulated costly requirements to provide information to the regulator, even though this would have the effect of increasing the cost for the regulator of monitoring the sector for which it is responsible.
33. It is also possible to *impose or increase a burden for a person* where this serves the purpose of a wider change which removes or reduces burdens on them. An order could for example remove obligations in legislation to supply fifty items of information and replace this requirement with an obligation to supply ten others. An order could also remove a custodial sentence from an offence but increase the maximum fine for it, where this is for the purpose of removing or reducing burdens. However, it would not be possible for an order to remove one burden but to impose an entirely unrelated burden.
34. Subsection (4) has the effect that it will not be possible to remove or reduce burdens which only affect a Minister of the Crown or government department, except where the burden affects the Minister or department in the exercise of a regulatory function. 'Regulatory function' is defined in section 32.
35. Subsection (5) provides that for the purposes of subsection (2), financial cost or administrative inconvenience may result from the *form of legislation*, for example where the legislation is hard to understand. This would cover a case in which the meaning of the legislation can in the end be determined, but only as a result of a disproportionate amount of effort. For example, where provisions governing an area are contained in many different pieces of legislation, the order-making power in section 1 could be used to restate and bring together the relevant provisions so that it is less costly or inconvenient to understand them. Similarly, for example, where a provision was obscurely drafted the order-making power in section 1 could be used to restate the provision more clearly so that it is less costly or inconvenient to understand it.
36. This subsection would also cover a case in which the meaning of legislation is unclear, for example because it is ambiguous. If the ambiguity resulted in costs or administrative inconvenience, the order-making power in section 1 could be used to remove it.
37. 'Legislation' is defined in subsection (6) and includes local as well as public general Acts, and subordinate legislation as well as primary legislation. Local Acts cover limited areas or particular bodies or institutions, such as particular charities or port authorities: their chapter numbers are small roman numerals. The definition of 'legislation' does not include any instrument which is Northern Ireland legislation within the meaning of section 24 of the 1978 Act (such as Acts of the Parliament of Northern Ireland, or Orders in Council made under section 1(3) of the Northern Ireland (Temporary Provisions) Act 1972).
38. Subsection (7) provides that the provision that can be made by order under this section includes provision which:

*These notes refer to the Legislative and Regulatory Reform Act 2006 (c.51) which received Royal Assent on 8 November 2006*

- abolishes, confers or transfers, or provides for the delegation of, functions of any description (which would include functions of legislating);
  - creates or abolishes a body or office;
  - amends or repeals any enactment.
39. An order under this section could transfer regulatory functions from one regulator to another where this was, for example, for the purpose of reducing burdens upon those being regulated by reducing the number of separate inspections or requirements to provide information to which they were subject.
40. Subsection (8) confers power for an order made under this section to make such *consequential, supplementary, incidental or transitional provision* as the Minister considers appropriate, including provision amending or repealing any enactment or other provision. Although “enactment” does not include an enactment comprised in, or an instrument made under, an Act of the Scottish Parliament (as a result of Schedule 1 to the 1978 Act), subsection (8) enables the amendment or repeal of *other provision* for consequential, supplementary, incidental or transitional purposes, and this extends to the amendment or repeal of Acts of the Scottish Parliament and instruments made under them. Whilst an order under this section cannot remove or reduce burdens arising from Northern Ireland legislation, provision can be made under this subsection amending or repealing Northern Ireland legislation for consequential, supplementary, incidental or transitional purposes.
41. The effect of this power (and the equivalent power in section 2(7)), taken with the restrictions in sections 9 and 10, is that the only type of provision an order can make amending or repealing legislation which would be within the legislative competence of the Scottish Parliament, or which is Northern Ireland legislation, is provision which is consequential, supplementary, incidental or transitional.

***Section 2: Power to promote regulatory principles***

42. **Section 2** provides a power for a Minister of the Crown to make provision by order which he considers would serve the purpose of ensuring that regulatory functions are exercised so as to comply with the Better Regulation Commission's five Principles of Good Regulation. (“Regulatory function” is defined in section 32.) These Principles of Good Regulation (subsection (3)) are that regulatory activities should be carried out in a way that is transparent, accountable, proportionate, consistent, and should be targeted only at cases in which action is needed.
43. Subsection (4) provides that orders made under this section can include provision which:
- modifies the way in which a regulatory function is exercised by any person;
  - amends the constitution of a body exercising regulatory functions which is established by or under an enactment;
  - transfers, or provides for the delegation of, regulatory functions from one person to another;
  - amends or repeals any enactment.
44. One example of modifying the way in which regulatory functions are exercised by a person would be to use the power under this section to impose a requirement on a regulator, when carrying out regulatory functions, to have regard to views of a body representing consumers in that area, so that the regulator’s regulatory activities are carried out in a way that is more accountable to consumers. Section 2 could also enable provision to be made requiring a regulator to exercise its functions on the basis of risk-assessment, so that its activities were proportionate to risk, with the result that the

burden of enforcement on the highest-risk is increased, but falls least upon those with the best record of compliance.

45. An example of amending by order the constitution of a body exercising regulatory functions set up by or under an enactment, would be amending the statute governing a regulator so as to provide that it has a Board structure, with at least half of the Board comprised of non-executive directors, for the purpose of securing that its regulatory activities are carried out in a way which is accountable and transparent.
46. An example of transferring functions from one person to another would be where two regulators are operating in separate but closely related areas, and where it is considered appropriate to transfer the regulatory functions so that they are exercised by a single regulator (whether one of the existing regulators, or a new one). This could be for the purpose of securing that regulatory activities are more proportionate across the range of activities being regulated. It may also be for the purpose of securing that regulatory activities are carried out in a more consistent way across the two separate but related areas of activity.
47. Subsection (5) further provides that provision transferring or providing for the delegation of regulatory functions can include provision which:
  - creates a new body to which, or a new office to the holder of which, these regulatory functions are then transferred ; or
  - abolishes a body from which, or office from the holder of which, regulatory functions have been transferred, as a result of which the body or office has become obsolete.
48. So in the context of transferring regulatory functions, it would be possible to create a new body to carry out the functions of an existing regulator, and to abolish a body carrying out regulatory functions which becomes obsolete once its functions have all been removed.
49. Subsection (6) provides that the provision that can be made under this section does not include provision conferring any new regulatory function or abolishing any regulatory function. So the provision that can be made under this section does not include provision changing existing regulatory functions conferred on any person by an enactment, and it is only possible to abolish a body carrying out regulatory functions if those functions continue to be exercised, having been transferred to another person.
50. Subsection (7) confers power for an order made under this section to make such consequential, supplementary, incidental or transitional provision as the Minister considers appropriate. This power includes power to make provision amending or repealing *any enactment or other provision*, including Acts of the Scottish Parliament, Scottish statutory instruments, and Northern Ireland legislation.

## **Restrictions**

### ***Section 3: Preconditions***

51. **Section 3** imposes conditions which the Minister must consider to be satisfied before he can make an order containing provision under section 1(1) or 2(1).
52. The conditions set out in subsection (2) apply (where relevant) to provision made under sections 1(1) or 2(2) which is not merely restating an enactment (as defined in subsection (5)).
53. There are six conditions set out in subsection (2).
  - The first condition is that there are no non-legislative solutions which will satisfactorily remedy the difficulty which the order is intended to address. An

example of a non-legislative solution might be the issuing of guidance about a particular legislative regime.

- The second condition is that the effect of the provision made by the order is proportionate to its policy objective. A policy objective might be able to be achieved in a number of different ways, some of which may be far more onerous than others and may be considered to be a disproportionate means of securing the desired outcome. The Minister must consider that this is not the case, and that there is an appropriate relationship between the policy aim and the means chosen to achieve it.
  - The third condition is that the provision made by the order, taken as a whole, strikes a fair balance between the public interest and the interests of the persons adversely affected by the order. So it will be possible to make an order which will have an adverse effect on the interests of one or more persons only if the Minister is satisfied that it will also have beneficial effects which are in the public interest. Whenever an order imposes or increases a burden for a person, it adversely affects their interests, so the Minister must take into account any new or increased burdens when considering whether or not this condition is met.
  - The fourth condition is that the provision made by the order does not remove any necessary protection. The notion of necessary protection can extend to economic protection, health and safety protection, and the protection of civil liberties, the environment and national heritage. Protections which would have been thought to be necessary in the past may no longer be considered necessary.
  - The fifth condition is that the provision made by the order will not prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise. This condition recognises that there are certain rights that it would not be appropriate to take away from people using an order, and has certain parallels with the concept of 'legitimate expectation'. Any right conferred or protected by the European Convention on Human Rights is a right which a person might reasonably expect to keep.
  - The sixth condition is that the provision made by the order is not constitutionally significant. This condition would allow orders to amend enactments which are considered to be constitutionally significant, but only if the amendments are not themselves constitutionally significant.
54. The Minister is also required to set out in the explanatory document which he must lay before Parliament (section 14) *why* he considers that these conditions are met.
55. Where provision made under section 1(1) or 2(1) is merely restating an enactment, the six conditions listed in subsection (2) do not apply. However subsections (3) and (4) have the effect that a Minister may only make provision of this type in an order if he is satisfied that the provision would make the law more accessible or more easily understood (for example, by consolidating disparate pieces of legislation or restating existing provisions in accordance with modern drafting practices).
56. The meaning of the term “to restate” is given in subsection (5). This also applies in relation to sections 4 to 7.

#### ***Section 4: Subordinate legislation***

57. **Section 4** places certain restrictions on the ability of orders under this Part to confer or transfer a function of legislating. The definition of “function of legislating” is given by subsection (7).
58. Subsection (1) provides that a function of legislating can only be conferred on, or transferred to, a person within one of the following three categories. These are:
- a Minister of the Crown. (This is subject to subsections (3) to (5).)

- any person on or to whom functions are conferred or have been transferred by an enactment (for example, local authorities, or regulatory bodies).
  - a body which, or the holder of an office which, is created by the order. This will enable an order which is creating a new body or office (under section 1(7)(b) or 2(5)(a)) and transferring other functions to that body or office, at the same time to confer on that body or office a function of legislating.
59. Subsection (2) explicitly prevents an order making provision authorising the further delegation of any function of legislating.
60. In the case that a provision confers a function of legislating on a Minister of the Crown, this is restricted by the conditions set out in subsections (4) and (5). The condition in subsection (4) is that the Minister must exercise the function of legislating which has been conferred on him by making a statutory instrument. The condition in subsection (5) is that such a statutory instrument must be subject to either the negative resolution procedure or the affirmative resolution procedure.
61. It will be for the Minister making the order conferring or transferring the function, to decide which of these is appropriate in the particular case. Where the negative resolution procedure is to apply, subsection (5)(a) provides that the procedure set out in section 5(1) of the Statutory Instruments Act 1946 will apply to the statutory instrument. This procedure is that the instrument shall be laid before Parliament after being made and shall be annulled if, within 40 days of laying, either House makes a resolution that it should be annulled. These conditions do not apply where an order confers a function of legislating on someone other than a Minister, for example where the function of making bylaws is conferred upon a local authority.
62. It will be necessary for the Minister, when laying an explanatory document before Parliament in accordance with the requirements of section 14, to explain his reasons for conferring a new function of legislating and to justify the procedural requirements he has specified in relation to it.
63. The conditions in section 4 do not apply to provision in an order which is merely restating an existing enactment. So this section would not prevent an order restating a provision which itself conferred a function of legislating but which did not comply with the restrictions in this section.

### ***Section 5: Taxation***

64. This section prohibits an order made under this Part from imposing, abolishing or varying any tax.
65. It also contains a separate power enabling the Treasury to make regulations to provide tax neutrality in relation to a transfer of property, rights and liabilities which may arise from the merger of bodies by or under an order made under Part 1. This will enable the Treasury to make appropriate tax provision, at the appropriate time to ensure that a transfer does not give rise to a tax change or confer a tax advantage on either party. For the purposes of this power the relevant taxes are income tax, corporation tax, capital gains tax, stamp duty and stamp duty reserve tax.
66. Regulations made under this section are to be made by statutory instrument, subject to annulment in pursuance of a resolution of the House of Commons.

### ***Section 6: Criminal penalties***

67. This section sets limits on the order-making powers in relation to criminal offences and penalties. An order under this Part cannot create a new offence with penalties exceeding those set out in subsections (1) to (3). Nor may it increase the penalty for an existing offence so as to exceed those limits. Subsections (4) and (5) contain transitional

provisions until the coming into force of the relevant provisions of the Criminal Justice Act 2003.

68. The maximum penalty that can be imposed when an offender is convicted on indictment is two years imprisonment.
69. The maximum custodial sentence that can be imposed when an offender is convicted summarily is:
  - in the case of a summary offence tried in England and Wales, fifty one weeks;
  - in the case of an either way offence tried in England and Wales, twelve months;
  - in the case of Scotland or Northern Ireland, six months.
70. However, if an order is made before the day on which section 281(5) of the Criminal Justice Act 2003 comes into force, the order must provide that for any summary offence which is committed before that day, any reference in the order to a term of imprisonment of fifty one weeks must be read as a reference to the current lower maximum of six months: subsection (4).
71. Similarly, if an order is made before the day on which section 154(1) of the Criminal Justice Act 2003 comes into force, the order must provide that for any offence triable either way which is committed before that day, any reference in the order to a term of imprisonment of twelve months must be read as a reference to the current lower maximum of six months: subsection (5).
72. The maximum fine that can be imposed when an offender is convicted summarily is provided for by subsections (1)(b)(ii) and (3).
73. The restrictions in this section do not apply where the provision made is merely restating an enactment.

### ***Section 7: Forcible entry etc***

74. This section prevents an order under this Part from making provision authorising forcible entry, search or seizure, or compelling the giving of evidence. This does not, however, prevent an order from *extending* an existing power to do any of those things, but it can only do so where the power is extended for purposes similar to those to which the power applied before the order was made. For example, there might be an existing power to search certain buildings in certain circumstances. An order which is making provision for the purpose of removing or reducing burdens, might greatly reduce the circumstances in which a search of those buildings could take place. The order might, however, also extend the existing power in certain limited respects, for purposes similar to the purpose of the original power.
75. The restriction on making provision authorising forcible entry, search or seizure, or compelling the giving of evidence does not apply to provision which is merely restating an enactment.

### ***Section 8: Excepted enactments***

76. This section provides that orders made under Part 1 cannot make provision amending or repealing any provision of Part 1 itself, or of the Human Rights Act 1998.

### ***Section 9: Scotland***

77. This section prohibits an order made under Part 1 from making provision which would be within the legislative competence of the Scottish Parliament if contained in an Act of that Parliament. So it prevents the amendment or repeal of Acts of the Scottish Parliament, instruments made under them, or Acts of the Westminster Parliament which make provision about devolved matters (having been passed prior to the passing of



the Scotland Act 1998 or, in some cases, afterwards). However, section 9 makes clear that this prohibition does not affect the powers to make consequential, supplementary, incidental or transitional provision in sections 1(8) and 2(7).

### **Section 10: Northern Ireland**

78. This section prevents an order made under Part 1 from amending or repealing any Northern Ireland legislation (within the meaning of section 24 of the 1978 Act), except under the powers to make consequential, supplementary, incidental or transitional provision (sections 1(8) and 2(7)).

### **Section 11: Wales**

79. This section requires the agreement of the Assembly for any provision in an order which confers a function upon the Assembly, modifies or removes a function of the Assembly, or restates a provision conferring a function upon the Assembly.

## **Procedure**

### **Section 12: Procedure: introductory**

80. **Section 12** sets out procedural requirements for making orders under sections 1 and 2. The Minister must consult on his proposals for an order (section 13). He must then lay a draft order and an explanatory document before Parliament (section 14). The order must be made by statutory instrument in accordance with the negative resolution procedure (section 16), the affirmative resolution procedure (section 17) or the super-affirmative resolution procedure (section 18). Section 15 sets out how the procedure is to be determined. The Minister must recommend in the explanatory document the procedure he considers appropriate. The Minister's recommended procedure will apply unless either House of Parliament requires a higher level of procedure.
81. Whilst not specifically introduced by section 12, another important aspect of the procedure for orders is that under all three procedures set out in sections 16 to 18, provision is made for an additional mechanism (which might be referred to as a 'veto') enabling a committee of either House charged with reporting on an order to prevent the order from being made.

### **Section 13: Consultation**

82. This section sets out the consultation process which the Minister must follow before making an order under this Part. Subsection (1) lists those persons or bodies that the Minister must consult, depending on the subject matter of the proposals and who is likely to be affected by them.
83. Under paragraph (c) the Minister must consult the Assembly where the proposals, to the extent that they *apply* in or as regards Wales, relate to a matter in relation to which the Assembly has functions. (Note that the requirement does not apply in relation to matters which merely *extend* as a matter of law to Wales, but which have no practical application there.) However paragraph (c) does not apply to provision which adds to or changes the functions of the Assembly, or restates provision conferring a function upon the Assembly, since in this case section 11 requires the consent of the Assembly.
84. Under paragraph (d) the Minister must consult the Law Commission, the Scottish Law Commission or the Northern Ireland Law Commission in such cases as he considers appropriate. This might be the case when one of the Commissions had relevant experience concerning the subject area affected by the order, perhaps because it was within their current or recent programme of work. Under paragraph (e) there is a general requirement that the Minister consult persons other than those listed in paragraphs (a) to (d) if he considers it appropriate.

85. Subsection (2) specifies that if the Minister varies his proposals as a result of the consultation he has undertaken, then he must carry out such further consultation on the changes he has made as he considers appropriate. The Minister does not therefore 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.
86. Subsections (3) and (4) are transitional provisions. They deal with consultation which has taken place before the date on which these sections come into force.
87. Subsection (3) is meant to allow for consultation to take place before commencement. If any consultation is undertaken before commencement, and that consultation would to any extent satisfy any of the requirements of section 13, those requirements are, to that extent, taken to have been satisfied. It is not necessary therefore to repeat the consultation.
88. Subsection (4) applies specifically to consultation carried out under the 2001 Act. Where proposals for an order under this Part are the same as proposals for an order under section 1 of the 2001 Act and consultation has been carried out on those proposals in accordance with the requirements of that Act, then consultation will be taken to have been satisfied for the purposes of this section (even where the proposals have been varied following consultation under the 2001 Act and it was appropriate that no further consultation be undertaken). This means that such proposals do not need to be consulted on again.

#### ***Section 14: Draft order and explanatory document laid before Parliament***

89. This section requires a Minister to lay before Parliament a draft of the order he wishes to make and an explanatory document. The information contained in the explanatory document is intended to assist Parliament in scrutinising the order. The list of matters that must be covered by the explanatory document is given in subsection (2). These include a general requirement for the Minister to give reasons for the provision he wishes to make, an explanation as to why the Minister considers that the preconditions in section 3 are satisfied, and information about the consultation he has undertaken.
90. Where the Minister wishes to make an order under section 1, subsection (2)(d) requires him (so far as it is appropriate) to provide an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens. The requirement to make and give such an assessment is intended to be proportionate to the nature of the order being made. In some cases the effect of the order will be worthwhile but minor and will not merit a very detailed assessment, in which case a brief statement will be included in the explanatory document to the order. Where appropriate it is expected that requirement under subsection (2)(d) for an assessment of the extent to which the provision would remove or reduce any burden or burdens may be met by quoting the assessment made in an Impact Assessment, or attaching that document to the explanatory document.
91. Subsection (2)(e) requires the Minister to identify and give reasons for any functions of legislating conferred by the order, and the procedural requirements which will have to be complied with when those functions are exercised.
92. Subsections (3), (4) and (5) set out provisions concerning the disclosure of representations made in response to consultation under section 13. Where a person makes representations in response to consultation and asks the Minister not to disclose those representations, the Minister must not disclose them in the explanatory document where such disclosure would constitute an actionable breach of confidence by any person (were it not for Parliamentary privilege). The Minister *need not* disclose information contained in representations relating to a person other than the consultee if it appears to him that such disclosure could adversely affect the interests of that other person and he has been unable to obtain the consent of that person. It should be

noted that subsection (5) provides that these provisions do not affect any disclosure that is requested by, and made to, a Parliamentary committee charged with reporting on draft orders. So even if such information is withheld from the explanatory document, this would not prevent a Minister from providing the information to the Parliamentary committees on request.

### ***Section 15: Determination of Parliamentary procedure***

93. This section sets out the procedure for determining which of the three alternative types of parliamentary procedure will apply to an order.
94. Subsections (1) and (2) require the explanatory document laid by the Minister under section 14 to contain his recommendation as to which Parliamentary procedure should apply and his reasons for this recommendation. The level of scrutiny recommended will depend on his view of the complexity and impact of the order, and may be informed by representations on the proposals received during the consultation process.
95. Subsections (3) to (5) provide that the Minister's recommendation for a procedure shall apply unless either House of Parliament requires that a more onerous procedure shall apply.
96. Subsection (6) sets out the two different ways in which a House is taken to have required a particular procedure. A House may require a procedure by resolving (within the period of 30 days beginning on the day on which the draft order was laid before Parliament) that a particular procedure shall apply. If that does not happen, a committee of that House which is responsible for reporting on the order may make a recommendation that a particular procedure should apply, which will take effect unless the recommendation is subsequently rejected by a resolution of the relevant House. In order to be effective in determining which procedure will apply to the order, both the recommendation of the committee and any resolution of the House rejecting it must be made within the period of 30 days beginning on the day the draft order was laid before Parliament.
97. So, if the Minister recommends the negative resolution procedure, this will apply unless, within 30 days, either House requires the affirmative resolution or super-affirmative resolution procedure, in which case that higher level of procedure will apply instead (subsection (3)). Similarly, if the Minister recommends the affirmative resolution procedure, that will apply unless, within 30 days, either House requires the super-affirmative procedure, in which case that will apply instead (subsection (4)). If the Minister recommends the super-affirmative procedure from the start, then that is the procedure that will apply (subsection (5)).
98. In effect, either House is able to require the level of procedure they consider appropriate, although it should be noted that the committees can require a higher, but not a lower, level of procedure. There is no need for both Houses to agree on the necessary level of procedure; a resolution or recommendation from either House is sufficient to increase the level of procedure.
99. Parliamentary scrutiny of orders is currently undertaken by the House of Commons Regulatory Reform Committee and the House of Lords Delegated Powers and Regulatory Reform Committee.

### ***Section 16: Negative resolution procedure***

100. This section sets out the procedure which will apply where an order is to be made under the negative resolution procedure. The Minister may make an order in the terms of the draft he laid (allowing for any non-material changes he wishes to make) unless, within 40 days of the draft order being laid, either House of Parliament passes a resolution that the order may not be made. (The ability to make non-material changes to the draft order would permit, for example, the correction of any typographical errors identified by the committees.)

101. When the draft order is laid before Parliament, it is scrutinised simultaneously by a committee of each House charged with reporting to the House on the order. Subsection (4) provides that the relevant committee of either House can, at any time after the expiry of the period of 30 days beginning on the day the draft order was laid before Parliament and before the expiry of the period of 40 days beginning on the day the draft order was laid before Parliament, require that the Minister not make an order in the terms of the draft order, by making a recommendation in those terms. A committee may make such a recommendation on any grounds and, in the event that it does so, the Minister may not make the order unless the recommendation is overturned by a resolution of the relevant House in the same Parliamentary session. This provision (which is mirrored in the affirmative resolution and super-affirmative resolution procedures) therefore confers the ability on a committee of either House to prevent an order from being made.
102. Where a recommendation made by a committee is subsequently overturned by a resolution of the relevant House, subsection (8) provides that, when calculating the 40-day period, no account is taken of the days between the committee making the recommendation and the House overturning it. This ensures that, should a recommendation of a committee be overturned by the relevant House more than 40 calendar days after the laying of the draft order, each House nevertheless has the opportunity to resolve against the making of the order under subsection (3).

### ***Section 17: Affirmative resolution procedure***

103. This section sets out the procedure which will apply where an order is to be made under the affirmative resolution procedure. The Minister may make an order in the terms of the draft (allowing for any non-material drafting changes) only if, after 40 days of the draft order being laid before Parliament, the draft order is approved by a resolution of each House of Parliament. Non-material drafting changes might be necessary as a result of any change of procedure the order was subject to (under the provisions in section 15).
104. When the draft order is laid before Parliament, it is scrutinised simultaneously by a committee of each House charged with reporting to the House on the order. Subsection (3) provides that the relevant committee of either House can, at any time after the expiry of the period of 30 days beginning on the day the draft order was laid before Parliament and before the expiry of the period of 40 days beginning on the day the draft order was laid before Parliament, require that no further proceedings be taken on the draft by making a recommendation in those terms. This recommendation may be made on any grounds and, in the event that a committee makes such a recommendation, no further proceedings may be taken in relation to the draft order unless the recommendation is overturned by a resolution of the relevant House in the same Parliamentary session. Thus, unless overturned, the committee's recommendation will mean that the House will not proceed to an affirmative resolution and the Minister will therefore be unable to make the order. A committee of either House is thus able to prevent an order from being made.
105. Subsection (7) makes the same provision as section 16(8).

### ***Section 18: Super-affirmative resolution procedure***

106. This section sets out the procedure which will apply where an order is to be made under the super-affirmative procedure.
107. This is a two-stage procedure during which there is opportunity for the draft order to be revised by the Minister. During the initial period of 60 days beginning with the day on which the draft order was laid before Parliament, the relevant Parliamentary committees simultaneously consider and may report on the draft order, or either House may make a resolution with regard to the draft order. The Minister must have regard to any such reports and resolutions, as well as to any other representations made about the draft order during the 60-day period. Once the 60-day period has expired, if the Minister wishes to make the order with no changes, he must lay a statement in accordance with

subsection (3). He may then make an order in the terms of the draft (allowing for any non-material drafting changes) but only if it is approved by a resolution of each House of Parliament.

108. Alternatively, if the Minister wishes to make material changes to the draft order he has laid, he must lay before Parliament a revised draft of the order and a statement in accordance with subsection (7) specifically setting out the revisions he proposes. (This revised draft order will be considered by committees of both Houses.) The Minister may only make an order in the terms of the revised draft if it is approved by a resolution of each House of Parliament.
109. Non-material drafting changes might be necessary as a result of any change of procedure the order was subject to (under the provisions in section 15).
110. However, subsections (5) and (9) provide that a committee of either House charged with reporting on the order can require that no further proceedings be taken on the draft by making a recommendation in those terms. This recommendation may be made on any grounds and can be made at any time after the laying of a statement in accordance with subsection (3), or after the laying of a revised draft order in accordance with subsection (8), and before the draft order is approved by a resolution of that House. Where such a recommendation is made by a committee, no further proceedings may be taken in relation to the order unless that recommendation is overturned by a resolution of the relevant House in the same Parliamentary session. This means the House will not proceed to an affirmative resolution and the Minister will therefore be unable to make the order. A committee of either House is thus able to prevent an order from being made.
111. Subsection (11) provides that the restrictions on the disclosure of representations made during consultation, which the Minister must make in the explanatory document laid before Parliament under section 14(2)(f), also apply so as to restrict the disclosure of representations made during the initial 60-day scrutiny period of the super-affirmative procedure which the Minister must make in his statement detailing those representations under subsections (3)(b) and (7)(b)(i).

## **General**

### ***Section 20: Combination with powers under the European Communities Act 1972***

112. This section enables the order-making powers under this Part to be exercised together with the power to make an order under section 2(2) of the 1972 Act in a single instrument. This will enable a single order to implement Community law under section 2(2) of the 1972 Act and, for example, to remove or reduce burdens resulting from pre-existing statutory provisions which are thought to be unnecessary or superseded following the implementation of the new EC regulatory requirements.
113. By virtue of subsection (2), the procedure applicable to a combined instrument will be that set out in Part 1 of this Act (including the consultation requirements in section 13, the requirement to lay an explanatory document before Parliament in section 14, and the three alternative Parliamentary procedures in sections 16 to 18), rather than the procedural requirements of section 2(2) of the 1972 Act.