



House of Commons  
Regulatory Reform Committee

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# Draft Regulatory Reform (Fire Safety) Order 2005

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**Ninth Report of Session 2004–05**

*Report, together with formal minutes and  
written evidence*

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## The Regulatory Reform Committee

The Regulatory Reform Committee is appointed to consider and report to the House of Commons on proposals for regulatory reform orders under the Regulatory Reform Act 2001 and, subsequently, any ensuing draft regulatory reform order. It will also consider any "subordinate provisions order" made under the same Act.

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A list of Reports of the Committee in the present Session of Parliament is at the back of this volume.

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# Contents

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| <b>Report</b>   | <i>Page</i> |
|---|-------------|
| <b>Report under Standing Order No. 141</b>                                  | <b>3</b>    |
| <b>1 Introduction</b>   | <b>3</b>    |
| <b>2 The report on the proposal and the Department's response</b>           | <b>5</b>    |
| Drafting and interpretation of articles 13 and 14                           | 6           |
| Protection of fire-fighters carrying duties other than fighting fire        | 7           |
| Definition of "escape" and "place of safety"                                | 7           |
| Provision of guidance and monitoring of enforcement authorities             | 8           |
| Common parts of houses in multiple occupation (HMOs)                        | 9           |
| Power to require enforcement action on the part of any person               | 10          |
| Fire Precautions (Sub-surface Railway Stations) Regulations 1989            | 11          |
| Power to serve alterations notices  | 12          |
| Definition of "safety" in article 2   | 14          |
| Power to amend provisions of the Order by subordinate provisions order      | 14          |
| Commencement provisions of the Order  | 15          |
| Provision of guidance on the interpretation and implementation of the Order | 16          |
| Other amendments  | 18          |
| The Housing Act 2004 and the application of the two year rule               | 18          |
| <b>3 Other representations made on the proposal</b>                         | <b>19</b>   |
| House of Lords Committee on Delegated Powers and Regulatory Reform          | 19          |
| Other representations   | 20          |
| <b>4 Handling of the proposal</b>   | <b>20</b>   |
| Relationship with fire safety law in Scotland                               | 20          |
| The debate  | 20          |
| <b>5 Recommendation</b>   | <b>21</b>   |
| <b>Formal minutes</b>   | <b>22</b>   |
| <b>List of written evidence</b>   | <b>23</b>   |

**Reports from the Regulatory Reform Committee in the present Session**

*inside back cover*



# Report under Standing Order No. 141

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The Regulatory Reform Committee has examined the draft Regulatory Reform (Fire Safety) Order 2005 in accordance with Standing Order No. 141. We recommend unanimously that the Order be approved.

## 1 Introduction

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1. The Proposal for the draft Regulatory Reform (Fire Safety) Order 2005 was laid before the House by the Office of the Deputy Prime Minister on 10 May 2004. We published our report on the proposal on 2 August 2004. The Government proposed by Regulatory Reform Order to reform and consolidate provisions in a large number of existing Acts and secondary legislation into a single regulatory regime for fire safety in England and Wales. The proposed new regime is based on the principle of risk assessment by designated persons with responsibility for the safety of others in the event of fire at each non-domestic premises. The proposed new regime would also establish a single authority in each area with enforcement duties under the Order.

2. Present fire safety regulation in England and Wales is governed by two major pieces of legislation – the Fire Precautions Act 1971 (“the 1971 Act”) and the Fire Precautions (Workplace) Regulations 1997 (“the 1997 Regulations”). The 1971 Act applies to all premises in use as hotels, boarding houses, factories, offices, shops and in connection with the running of railways. With certain exceptions, it requires the occupier of each premises to open them to inspection by the local fire authority (this being in practice the local fire brigade), who will issue a fire certificate to the occupier only when it has been satisfied that adequate means of raising the alarm, of escape and of fighting any fire which occurs have been put in place. The 1997 Regulations, which apply to most premises in which people are employed, require employers to carry out fire risk assessments, in the light of these to provide appropriate fire precautions and to provide their employees with appropriate information, instruction and training concerning the risk of fire and the actions to be taken in the event of its discovery.

3. Article 9 of the proposed Order introduces the principle of risk assessment, which underlies the Government’s intended future approach to Fire Safety legislation. This requires that, in respect of all **premises** covered by the Order, **the responsible person** must make “a suitable and sufficient assessment of the risks to which **relevant persons** are exposed”. This is intended to enable the responsible person to take such fire precautions as may be necessary to comply with specific requirements and prohibitions provided by the Order. In addition, the draft Order imposes similar obligations on every person other than the responsible person who has to any extent control of premises, so far as the requirements relate to matters within his control. This would include any person with a contractual obligation in respect of the safety of premises (as would be the case with any person responsible for the maintenance of fire safety equipment within those premises).

4. Article 2 of the draft Order defines the highlighted terms above broadly as follows:

**Premises** are “any place, including any workplace; any vehicle, vessel, aircraft or hovercraft; any installation on land (including the foreshore and other land intermittently covered by water) and any other installation ... and any tent or movable structure.”

**Responsible persons** are any employer with control of a workplace, any other person with control of premises for the purposes of his business or, in any other case, the owner of the premises.

**Relevant persons** are any person who is lawfully on the premises or any person in the vicinity who is at risk from a fire on the premises.

5. Article 6(1) of the Order disapplies its provisions from bearing on certain premises, including domestic premises, offshore installations (e.g. oil rigs), ships, aircraft, locomotives, licensed vehicles, mines and boreholes. “Domestic premises” are defined as “premises occupied as a private dwelling (including any garden, yard, garage, outhouse, or other appurtenance of such premises which is not used in common by the occupants of more than one such dwelling)”. Housing law, rather than fire safety law, will apply to any houses in multiple occupation so far as they consist of domestic premises for the purposes of the Order (although, as we noted in our report on the proposal the Department considers that fire safety law does apply to houses in multiple occupation “insofar as they may have common parts or may be used as a place of work.”

6. The Government laid the draft Order before Parliament on 17 March 2005, together with an explanatory memorandum by the Office of the Deputy Prime Minister (including as an Annex a further note relating to the relationship between reforms contained in the draft Order and the Housing Act 2004).<sup>1</sup> Earlier versions of the draft Order were laid on 21 February and 7 March; these versions were withdrawn in turn, with the each of the draft Orders being further amended before being re-laid. During our scrutiny of the version of the draft Order that was laid before the House on 7 March, we asked the Department a number of questions in line with our Standing Order 141(14)(c). Our letter is reproduced as Annex A to this Report; the Department’s letter of response is reproduced as Annex B.

7. The House has instructed us to examine the draft Order against such of the criteria specified in Standing Order No. 141(6) as are relevant. We are also required to consider the extent to which the responsible Minister has had regard to any resolution or report of the Committee or to any other representations made during the period for Parliamentary consideration.<sup>2</sup> Our discussion of matters arising from our consideration is set out below.

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1 Copies of the Draft Order and explanatory memorandum are available to Members of Parliament from the Vote Office and to members of the public from the Department. They are also available on the Cabinet Office Website.

2 Standing Order No. 141(7)

## 2 The report on the proposal and the Department's response

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8. We issued our report on the proposal on 2 August 2004.<sup>3</sup> Our recommendation was that various amendments should be made to the proposal before a draft Order was laid before the House. It contained a number of recommendations for amendments to the draft Order, or for the Department to supplement it with additional administrative action:

- that the Secretary of State should be required to provide guidance to responsible persons and to enforcing authorities as to what the words “where necessary” mean in articles 13 and 14 of the draft Order (report paragraph 77).
- that the draft Order should be amended to provide that firefighters receive the protection of the Order's provisions when they are on premises carrying out fire authority duties other than firefighting (report paragraph 82).
- that the draft Order be amended to give a clearer definition of what constitutes a place of safety (report paragraph 88).
- that the draft Order be amended to place a duty on the Secretary of State to issue guidance to fire authorities on their enforcement of the Order's provisions and to monitor the enforcement activity of fire authorities, and to allow the Secretary of State to direct fire authorities in their enforcement activity (report paragraph 104).
- that the Order be amended to enable enforcement action to be taken against persons (other than those defined as responsible persons) with any responsibility under the Order for the safety of relevant persons on the premises (report paragraph 119).
- that the Fire Precautions (Sub-surface Railway Stations) Regulations 1989, which implemented the recommendations of the Fennell Report into the King's Cross fire disaster, be retained (report paragraph 127).
- that the application of the proposal to fire protection systems in houses in multiple occupation should be clarified (report paragraph 163).
- that the Secretary of State issue guidance to fire authorities on their use of the power to serve alterations notices where the condition of premises is believed to constitute a serious risk, and on the meaning of the term “serious risk” (report paragraph 166).
- that the extent of the power of an enforcement authority to serve an alterations notice should be clarified (report paragraph 170).
- that the definition of “safety” in article 2 of the proposed Order be amended so as to make its extent more explicit (report paragraph 174).

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3 Eleventh Report from the Regulatory Reform Committee, Session 2003-04, *Proposal for the Regulatory Reform (Fire Safety) Order 2004*, HC 684

- that the power to amend the principal provisions of the Order by subordinate provisions order should be made subject to the affirmative procedure (report paragraph 226).
- that the Secretary of State prepare and issue simple guidance on fire safety responsibilities for persons with responsibility for the safety of premises, to complement the detailed guidance which he proposes to publish (report paragraph 237).
- that the Secretary of State should be placed under a statutory duty to issue guidance on the implementation and interpretation of the Order (report paragraph 240).

9. We discuss below the way in which the Office of the Deputy Prime Minister has responded to each of the recommendations in our report on the proposal, giving our assessment of the draft Order in relation to each point.

### Drafting and interpretation of articles 13 and 14

10. Article 13 of the draft Order lays requirements on responsible persons in respect of the provision of fire fighting and fire detection equipment. These are to be provided by the responsible person “where necessary...in order to safeguard the safety of relevant persons”. Article 14 similarly provides for the keeping clear of routes to emergency exits and of the exits themselves “where necessary in order to safeguard the safety of relevant persons”. Our concern was that the effect of this in practice would be to make action on the part of responsible persons contingent on the perceived necessity (or otherwise) for that action in any given case. In our view, this constituted a dilution of the current standards of protection provided under extant legislation. We therefore considered that articles 13 and 14 of the proposed Order would only pass the necessary protection test in the Regulatory Reform Act if the Secretary of State provides guidance to a) responsible persons on what “where necessary” may mean and b) to enforcement authorities as to the effective performance of their duty to enforce the requirements of the Order.

11. We also recommended that the Department should consider whether any statutory bar to the enforcement of fire safety requirements pursuant to articles 13 and 14 of the proposed Order arose by virtue of those requirements not having been specified in Building Regulations.

### *The Department’s response*

12. The Department states that it wishes to assure the Committee that we shall be providing guidance to “responsible persons” and enforcement authorities on the meaning of “where necessary”.<sup>4</sup>

13. The Department has also confirmed that it considers no statutory bar exists in enforcing measures necessary under the draft Order.<sup>5</sup>

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4 Explanatory statement, paragraph 88

5 Explanatory statement, paragraph 9

### *Our assessment*

14. **We are content to accept the Department's assurance.**

### **Protection of fire-fighters carrying duties other than fighting fire**

15. Article 2 of the proposed Order defined “relevant person” as excluding “a firefighter who is carrying out his duties in relation to the function of a local authority”. This would mean that any responsible person would not be responsible for the safety from fire of fire-fighters on premises in pursuit of any of their duties other than fighting fire or rescuing people from fire. This would clearly have been a failure properly to protect firefighters and we recommended that the Department amend the Order to extend its protection to firefighters going about their duties in circumstances where there was not presently a fire in premises they entered.

### *The Department's response*

16. The Department has accepted this recommendation and amended article 2 so that firefighters will be treated as relevant persons when they are not carrying out their duties in relation to an emergency as defined under sections 7, 8 or 9 of the Fire and Rescue Services Act 2004.

### *Our assessment*

17. **We are content with the new wording in article 2.**

### **Definition of “escape” and “place of safety”**

18. Our report on the proposed Order noted with concern that, as drafted, it failed to make explicit that the place of safety to which the required route(s) of escape from a premises must give access should be a place of ultimate safety i.e. that such a place must itself provide for further means of escape should it itself subsequently become exposed to risk by expansion of the area affected by the fire. We therefore recommended both that the draft Order be amended to make this requirement explicit and that guidance issued to responsible persons about their obligations under the Order should reflect the fact that they would need to provide means of escape from the premises and any area enclosed by or within it.

### *The Department's response*

19. The Department states that it considers the Order as drafted would place responsible persons under a legal requirement to provide a means of ultimate escape from the risk of fire on premises under their control.<sup>6</sup> This is because a means of escape leading to an area in the vicinity of the premises which is, or might be, exposed to the risk of fire could not properly be considered to be a place of safety. Nevertheless, it has accepted that the clarity

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6 Explanatory statement, paragraph 17

of the definition in article 2 could be improved and consequently amended this to read: “Place of safety” in relation to premises, means a safe area beyond the premises”.

### *Our assessment*

20. We are content with the new wording in article 2.

## **Provision of guidance and monitoring of enforcement authorities**

21. In our examination of the proposal, we were concerned that the Order would not provide adequate inspection mechanisms to ensure that individual fire authorities were enforcing its requirements to a common standard. Our concern was motivated by the view that public confidence in the system of enforcement needed to be maintained at a time when, quite justifiably, the Government was wishing to move to a more flexible inspection and enforcement regime based on risk assessment of individual premises. We therefore recommended that article 26 of the draft Order be amended to provide that the Secretary of State must issue guidance to fire authorities on their enforcement of the provisions of the Order, that he must monitor the enforcement activity of fire authorities and that he may issue directions to fire authorities on their enforcement activity.

### *The Department’s response*

22. The Department considered this recommendation (and the similar recommendation made by our counterparts in the House of Lords Delegated Powers and Regulatory Reform Committee) and has concluded that the Order as drafted together with the provisions contained in the Fire and Rescue Services Act 2004 provide adequate protections in respect of the inspection of enforcement authorities and provision of guidance to them on the discharge of their enforcement responsibilities.

23. The Department acknowledges that the draft Order does not explicitly establish that enforcement authorities must carry out inspections of premises, but reasons that it does so by implication. It states “Article 26 of the Order sets out the basic duty to enforce. And the duty to make whatever inspections are needed in order for the enforcement authority to be satisfied that the provisions of the Order are being complied with is implied in that duty.”<sup>7</sup> Article 26 also provides that enforcing authorities must have regard to such guidance as the Secretary of State may give it.

24. The Department also states that it believes that a number of other articles in the Order imply a situation in which inspection of premises by enforcement authorities is to be expected, thus providing the necessary protection.<sup>8</sup> Article 27, which defines the powers of inspectors and provides that they may enter premises for the purpose of carrying out their duties under the Order or any regulations made under it, and article 32, which establishes that failures to comply with requirements imposed by the Order shall be offences, are cited as evidence in favour of the Order imposing substantive requirements on enforcement authorities to inspect.

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7 Explanatory statement paragraph 24

8 Explanatory statement, paragraph 24

25. The Department also cites the Fire and Rescue Services Act 2004, which provides that Her Majesty in Council may appoint inspectors, and the Secretary of State may appoint assistant inspectors and other officers for the purpose of obtaining information as to (a) the manner in which fire and rescue authorities are discharging their functions; and (b) technical matters relating to those functions.<sup>9</sup> The 2004 Act also requires that the Secretary of State publish a Fire and Rescue National Framework document, which must set out priorities and objectives for fire and rescue authorities in connection with the discharge of their functions, and report to Parliament on the extent to which fire and rescue authorities are acting in accordance with it. The latest version of this Framework, which was published in December 2004, makes reference to guidance already issued by the Secretary of State concerning of the management of enforcers' inspection duties.<sup>10</sup> Under the 2004 Act, the Secretary of State also has powers of intervention where he considers a Fire and Rescue Authority is failing, or is likely to fail, to act in accordance with the Framework. The 2004 Act also subjects Fire and Rescue Authorities to Comprehensive Performance Assessment by the Audit Commission. The Department states that the Audit Commission will carry out its examination of Fire and Rescue Authorities' performance from 2005/06 onwards with a view to monitoring the effectiveness of fire safety work in non-domestic premises.

26. The Department considers that these statutory provisions together supply sufficient guidance to enforcement authorities and that they establish a comprehensive system for monitoring and enforcing their duties under the Order and associated fire safety legislation. The Department has therefore not made any amendment to its draft Order in response to this recommendation other than to clarify that article 27(1)(b)(i) enables inspectors to inspect any premises which it is necessary to inspect to ensure compliance with the provisions of the Order.

### *Our assessment*

27. We consider that the provisions identified by the Department, as noted above, meet our concerns in this respect. **We are therefore now content that the Order maintains necessary protections.**

### **Common parts of houses in multiple occupation (HMOs)**

28. In our report on the proposal, we recommended that the Department consider amending or clarifying the Order to require that the responsible person must maintain all facilities, equipment and devices which may affect the common parts of houses in multiple occupation (HMO), whether or not they fall within parts of the HMO which are defined as "domestic premises". We noted that, as it was drafted, the Order would, for example, impose no requirement on a responsible person for the maintenance of a fire detector located in a private flat, although he would have that responsibility for other detectors on the same circuit in the common parts of the building in which that flat was located.

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<sup>9</sup> Fire and Rescue Services Act 2004, s. 28

<sup>10</sup> Fire and Rescue National Framework 2005/06, page 14, note 10

### *The Department's response*

29. Article 17 of the draft Order has been amended by the Department to provide that, where premises form part of a building, the responsible person may make arrangements with the occupier of any other part of the building (whether or not covered by the Order) for the purpose of ensuring that the requirements of the article are met, and that that occupier must co-operate with the responsible person.

30. Article 38 of the draft Order, which imposes requirements on responsible persons in respect of measures necessary to protect the safety of fire-fighters, has been amended in a similar way.

31. In both articles 17 and 38, the amended drafting reflects the need for the occupier of any private domestic premises to co-operate with the responsible person to allow him to carry out his duties. The Department expects that, under the terms of any lease, tenancy or licence agreement, the responsible person would be allowed reasonable access for the purpose of maintaining fire safety equipment throughout any premises, including those used as private dwellings. Where such provision has not been made in a lease or other agreement, the Department considers the courts would be likely to find that a responsible person had statutory rights of access for the purpose covered by the two articles.<sup>11</sup>

### *Our assessment*

**32. We are content with articles 17 and 38 as amended.**

## **Power to require enforcement action on the part of any person**

33. The proposed Order at articles 30 and 31 provided that enforcement and prohibition notices could be served on a responsible person in respect of premises; article 32(1) provided that the responsible person might commit an offence in failing to comply with their duties in respect of premises under the Order. We were concerned that persons other than the responsible person as defined in the Order who had duties under the Order could not be subject to any enforcement action under it. We recommended that the draft Order be amended to enable enforcement action to be taken against any person with a duty in respect of premises under the Order.

### *The Department's response*

34. The Department agreed that the Order required amendment to allow effective enforcement action against parties other than the responsible person, and amendments have been made to articles 30, 31 and 32(1).

### *Our assessment*

**35. We are satisfied that the effect of these amendments would be to maintain necessary protection.**

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<sup>11</sup> Explanatory statement, paragraph 92

## Fire Precautions (Sub-surface Railway Stations) Regulations 1989

36. The proposal for the Order included the revocation of the Fire Precautions (Sub-surface Railway Stations) Regulations 1989 made under the Fire Precautions Act 1971, which set minimum standards for the fire precautions to be taken at sub-surface stations. Article 24 of the proposed Order would give the Secretary of State a power to make new regulations to govern fire safety precautions on premises to which the Order applies.

37. In correspondence with us during Parliamentary consideration of the proposal, the Department indicated it had no plans to make new regulations for fire safety in subsurface railway stations.<sup>12</sup> This was because it believed that all necessary protections would be continued under other legislation, and in particular the Railway (Safety Case) Regulations 2000.

38. We were concerned that the new risk-assessment based regime provided under the Order might not be suitable for the particular circumstances of sub-surface railway stations, particularly where there was no indication that guidance specific to that kind of premises would be issued by the Secretary of State. We considered that the Order should be amended to allow the 1989 Regulations to remain in force, although we noted that protection could also be maintained by the Secretary of State issuing full guidance on the application of the Order to subsurface railway stations before exercising his proposed power under article 24 of the Order to revoke the 1989 Regulations.

### *The Department's response*

39. When it laid an earlier version of the draft Order before the House on 7 March 2005, the Department stated in its explanatory document that it continued to believe that necessary protection would be maintained by other legislation on the revocation of the 1989 Regulations. Notwithstanding this belief, it accepted that detailed guidance on the application of the Order to premises presently covered by these Regulations should be issued before their revocation "to ensure public certainty and confidence".<sup>13</sup> It therefore undertook to issue such guidance before the 1989 Regulations were revoked and had removed reference to them from the list of revocations in Schedule 5 to the draft Order.

40. The 1989 Regulations were made under powers given to the Secretary of State under section 12 of the Fire Precautions Act 1971. This Act will be repealed by the Order when it takes effect on 1 April 2006, but the 1989 Regulations will continue in force beyond that date by virtue of the Interpretation Act 1978<sup>14</sup> because they could have been made under article 24 of the Order.

41. But we were concerned that regulation 13 of the 1989 Regulations, which makes it an offence under section 12 of the Fire Precautions Act 1971 to breach regulations 4 to 11,

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12 HC(2003-04) 624, Appendix H Q48

13 Explanatory statement, paragraph 50

14 Section 17(2) of this Act provides that, "Where an Act repeals or re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears, - ... (b) in so far as any subordinate legislation made or other thing done under the enactment so repealed, or having effect as if so made or done, could have been made or done under the provision re-enacted, it shall have effect as if made or done under that provision."

could not continue in force under the Interpretation Act, because it could not have been made under article 24 of the draft Order. Article 32(1)(b) of the draft Order established that it would be an offence to fail to comply with any requirement or prohibition imposed by regulations made by the Secretary of State under article 24. It was not clear therefore that a breach of the regulations would continue to be an offence once the Order came into effect. Furthermore, article 32 provides that an offence is committed only where a breach of Regulations places one or more relevant persons at risk of death or serious injury in case of fire.

42. In our view, this appeared to provide a lower standard of protection from that provided by the current legislation, given that any breach of the 1989 Regulation is currently an offence under section 12 of the Fire Precautions Act 1971. We therefore sought further explanations from the Department as to how the Order would preserve the protections available under the current law.<sup>15</sup> In its response, the Department agreed that regulation 13 could not be saved by the Interpretation Act 1978, as it could not have been made under article 24 of the Order, and contended that once the Order comes into force, breaches of regulations 4 to 11 would be offences by virtue of article 32(1)(b) of the Order.<sup>16</sup> In order to clarify the position the Department agreed that it should amend the Order before it was re-laid to provide that article 32(1)(b) applied to Regulations made, *or having effect as if made*, under article 24 of the Order.

43. The Department also considered that the effect of the Order would be to make prosecution for breaches of regulations 4 to 11 possible only where relevant persons are exposed to risk of death or serious injury, but argued that that is all that is needed to maintain necessary protection. As the purpose of the Regulations is to prevent risks of death and serious injury from arising, the Department believed it would be appropriate for offences to be committed only in circumstances which directly give rise to those risks.

### *Our assessment*

**44. We accept that, as revised, article 32(1)(b) of the Order has the effect of ensuring all necessary protections are maintained under the relevant element of the Order.**

### **Power to serve alterations notices**

45. Article 29(1) of the proposed Order would have given to enforcing authorities the power to serve alterations notices on the responsible person where they considered premises constitute a serious risk to relevant persons, or may constitute such a risk if a change is made to them or in the use to which they are put. We considered that the way in which article 29(1) was drafted effectively created an unlimited power to issue alterations notices in respect of any non-domestic premises for the reason that it will always be possible any such premises might be altered or be used for a different purpose at some unspecified time in the future. The Department confirmed in correspondence with us during our scrutiny of the proposal that this had not been its intention, but considered that its drafting allowed a wide but not unreasonable discretion to enforcing authorities.

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<sup>15</sup> Annex A, questions 2 and 3

<sup>16</sup> Annex B, paragraphs 10 to 12

46. We were not persuaded by this. In our report on the proposal, we therefore recommended that article 29(1) be redrafted so that:

- a) The power to serve an alterations notice should apply where the authority is of the opinion that the premises are as stated; and
- b) The alterations notice states the authority's opinion and specifies the matters which, in the authority's opinion, give, or may give, rise to a serious risk.

47. We also recommended that article 29(1)(b) should refer to risks which may be caused if "a change" is made to premises, rather than "any change".

### *The Department's response*

48. The Department indicates in its explanatory statement on the draft Order that it remains of the view that the Order as it was proposed would only allow an alterations notice to be served where risk was either present or reasonably foreseeable. Nevertheless, it has made the amendments to article 29(1) of the draft Order which we recommended in our previous report.

49. In the earlier version of the draft Order that was laid before the House on 7 March 2005, article 29 provided that an enforcing authority may serve an alterations notice on the responsible person *or on any other person mentioned in article 5(3) of the Order*. Paragraphs (3) and (5) of article 29 as then drafted only imposed duties on the responsible person.

50. We were puzzled that the Department proposed to provide that a notice might be served on someone with no substantive duties under the relevant part of the Order and where no mechanism appeared to exist for ensuring that the responsible person, who would be the person required to comply with it, was aware of the notice having been served. We therefore asked the Department to explain its policy intentions more fully.<sup>17</sup>

51. In its response, the Department explained that it had wished to ensure that all responsible persons and other persons as specified at article 5(3) would be aware of the terms of any alterations notice which was served. There was not an intention in the drafting of article 29 to impose any requirements on other persons specified at article 5(3), but to provide a means whereby, for example, no contractor might, through being unaware of an alterations notice, undertake work which might place the responsible person in breach of that notice. By serving the notice on such a contractor in addition to the responsible person, the Department had sought to "assist them" to comply with article 22 of the draft Order, which requires any two or more persons sharing responsibilities in respect of premises to co-operate to enable them to comply with requirements imposed on them by or under the Order, including taking steps to inform each other of any risks to relevant persons arising from their undertakings. In the light of our question on this point, the Department accepted that the then draft Order did not properly implement this policy intention.<sup>18</sup>

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<sup>17</sup> Annex A, question 1

<sup>18</sup> Annex B, paragraphs 55 and 56

52. The draft Order as laid before the House on 17 March now provides at article 29(5)(a) that an alterations notice served on a responsible person may require him to notify other persons with responsibilities in respect of the premises concerned of the terms of the notice which has been served on him.

### *Our assessment*

53. **We are content with the form now taken by article 29 of the draft Order.**

### **Definition of “safety” in article 2**

54. In article 2 of the proposed Order, which supplies definitions of key terms as they are used in the Order, “safety” was defined as “the safety of persons in the event of fire”. We considered that this definition was too narrow in that it might be understood as excluding fire precautions and fire prevention. We recommended that the definition be amended to define “safety” more fully and explicitly.

### *The Department’s response*

55. The Department has indicated it believes that the Order as proposed made full provision in respect of fire precautions and fire prevention by virtue of articles 4 (on the meaning of “general fire precautions”) and 8 (on the duty to take general fire precautions). It has however accepted that “safety” could be more clearly defined at article 2 and this has now been amended to read “the safety of persons in respect of harm caused by fire”.

### *Our assessment*

56. **We are content with the revised definition of “safety” in article 2.**

### **Power to amend provisions of the Order by subordinate provisions order**

57. The Department had proposed that articles 9 to 22 of the Order be designated subordinate provisions subject to negative resolution. They proposed this for the reason that it would enable amendments to be made to it without difficulty in order to take account of changes in the relevant European legislation. We considered that such a designation was not appropriate, given the breadth and nature of the provisions concerned, which are the core fire safety requirements imposed on individuals under the Order.

58. Similarly, the Department had proposed article 45 be designated a subordinate provision subject to negative resolution. This article requires that where buildings are erected, altered or the purpose for which they are used changes, plans deposited with the local authority in accordance with building regulations must be the subject of consultation with the enforcing fire authority before the local authority may pass the plans. The purpose of so designating it was to facilitate the transposition of requirements about consultation into the Building Regulations themselves, whereupon article 45 would itself be revoked. We considered that such a move should receive a higher level of scrutiny than the Department proposed. Our recommendations was that articles 9 to 22 and 45 of the Order

should be designated subordinate provisions amendable by order subject to affirmative resolution.

### *The Department's response*

59. The Department states that it “has reduced the proposed designation to those elements of the Draft Order that it considers are technical or procedural”.<sup>19</sup> A description of those elements of the Order now designated as subordinate provisions is given in the explanatory statement at paragraphs 51 to 67. All except for article 1(3) are proposed to be amendable by Order subject to affirmative resolution. An Order amending article 1(3) would be subject to negative resolution.

### *Our assessment*

**60. We consider the proposed designation of these provisions as subordinate provisions, amendable on these bases, to be appropriate.**

### **Commencement provisions of the Order**

61. The Department intends that, subject to Parliamentary approval, the Order should come into force on 1 April 2006.<sup>20</sup> This date is still over a year in the future but the Department has explained that guidance to those affected by the Order is currently being produced and it is intended that this should be published no less than 12 weeks before the Order takes effect, so that the affected parties may become familiar with the guidance. There remains some uncertainty as to when this guidance is likely to have been completed and approved for publication. At the same time, the Department does not wish to postpone consideration of the draft Order in Parliament because it is concerned to avoid a situation in which the making of other new legislation relating to fire safety might make it necessary to exclude parts of the existing proposal from the Order through activation of section 1(4) of the Regulatory Reform Act. This section of the Regulatory Reform Act prevents amendment of legislation by Regulatory Reform Order where the provision concerned has been materially amended less than two years previously.

62. In the light both of the understandable wish that the reforms being considered in Parliament in the form of a Regulatory Reform Order can be presented in a clear and orderly manner and of the uncertainty about the scheduling of publication of the guidance documents needed to prepare for its introduction, the Department has proposed that article 1 of the Order, and article 52(1)(a), designating article 1(3) a subordinate provision, shall come into force on the day after that on which the Order is made. Article 1(3) of the Order states that all remaining provisions of the Order shall come into force on 1 April 2006. Under article 52(2), article 1(3) may be amended by subordinate provisions order subject to negative resolution.

63. The effect of these provisions is therefore to provide that most of the provisions of the Order will take effect on 1 April 2006, but that, by making the Order at a date prior to this,

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<sup>19</sup> Explanatory statement, paragraph 66

<sup>20</sup> Explanatory statement, paragraph 67

the Secretary of State will be empowered by statutory instrument to amend the coming into effect date, should that become necessary.

### *Our assessment*

64. As a result, the Department has submitted its draft Order for Parliamentary scrutiny more than a year before the planned commencement date of the Order. Nevertheless, the proposed commencement provisions of the Order give us no particular concerns.

### **Provision of guidance on the interpretation and implementation of the Order**

65. In our report on the proposal we considered the provision of guidance to be essential to the success of the reformed, goal-based fire safety regime. This is because “the onus for determining the appropriate level of fire precaution provision will fall on the responsible person”.<sup>21</sup> Moreover, as we noted in our comments on the proposed form of articles 13 and 14, which would require that responsible persons must ensure the provision of fire-fighting and detection equipment and emergency escape routes from fire “where necessary”, enforcers must understand how the Order is to be applied if they are to perform their necessary role. Article 29 of the draft Order provides that an enforcing authority may serve an alterations notice on a responsible person if the premises “constitute a serious risk to relevant persons”. It is clear that, in any given situation, it would be a matter of judgement for fire safety professionals when a serious risk warranting the exercise of the power under article 29 might exist. We therefore recommended that the Secretary of State issue guidance to fire authorities on the exercise of the power to serve alterations notices and the interpretation of the term “serious risk” as it is here used.

66. The Department had indicated at the time of laying its proposal that it intended to issue guidance to the public on its requirements. Copies of an early draft of one of the series of planned guidebooks were sent to us as we considered the proposal. While we were glad that the Department planned to produce the intended series of guidance documents, we noted that these would be relatively long and complex documents in themselves. Our view was that short and succinct guidance would be more likely to be useful to the majority of users, and by virtue of being easier to use would be more likely to be read. We therefore considered that standard entry level guidance to fire safety responsibilities should be made available to complement the detailed guidance.<sup>22</sup>

67. We also recommended that the Department amend the proposed Order to place the Secretary of State under a statutory requirement to issue guidance on its interpretation and application.<sup>23</sup> This recommendation was intended principally to relate to the duties of those who would be designated responsible persons under the Order. Our view was that making the provision of guidance a statutory requirement would underpin its importance

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21 HC(2003-04) 684, paragraph 233

22 HC(2003-04) 684, paragraph 237

23 *Ibid*, paragraph 240

in ensuring the effective and consistent application of the new fire safety regime across the range of premises to which the Order would relate.

### *The Department's response*

68. The Department indicates in its explanatory statement that it accepts our recommendation concerning the provision of entry level guidance and it states that stakeholders have been involved in the preparation and drafting of a guidance leaflet. It is intended that this leaflet be distributed to identified premises before the Order comes into force.<sup>24</sup> The Department also agreed that it would be necessary for the Secretary of State to issue guidance in respect of the interpretation of “serious risk” and have assured us such guidance will be issued.<sup>25</sup> **We welcome these responses.**

69. When the Department initially laid its draft Order, it indicated that it had not accepted our recommendation that the Secretary of State be under a statutory requirement to issue guidance. Two reasons were given for this: first, the Department stated that the responsible Minister had given undertakings during the consideration of the proposal that guidance would be issued, and the Department therefore believed it would not provide any benefit if the Order required in law what was already intended in practice. Secondly, the Department considered there was a risk that a statutory duty to issue guidance on interpretation of the Order could place the Secretary of State in the position of being expected to give evidence in legal proceedings.

70. We were surprised by the Department's responses. The issue of concern to us had never been the intention of the Secretary of State to issue guidance – about which there was no doubt – but that the provisions of the Order should recognise the crucial importance of guidance to the success of the new fire safety regime. Neither did we see how a requirement to issue guidance would lead to the Secretary of State being called upon routinely to give evidence in legal proceedings to which he was not party.

71. We sought further explanations from the Department concerning its reasons for not adopting our recommendation about the basis on which guidance should be issued.<sup>26</sup>

72. In its response, the Department indicated that it had had a number of concerns about our recommendation. It had been concerned that, if the effect of the proposed statutory requirement was that the Secretary published voluminous guidance, that might not prove the most helpful outcome for business, which would need guidance which was “effective and focussed and easy to use.”<sup>27</sup>

73. The Department had also been concerned that a requirement to issue guidance might in practice extend to an obligation to provide guidance which was specific to individual premises, if such specific guidance was sought from him by persons with responsibility for those premises under the Order.<sup>28</sup>

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24 Explanatory statement, paragraph 102

25 Explanatory statement, paragraph 95

26 Annex A, questions 4 and 5

27 Explanatory statement, paragraph 104

28 Annex B, paragraph 18

74. The Department had further been concerned that a requirement to publish guidance might cause the Secretary of State to need effectively to re-state very useful extant fire safety guidance which was produced by other bodies, such as the Health and Safety Commission and the British Standards Institution. In this connection the Department foresaw that there might be copyright difficulties where copyright in such guidance was not held by the Crown.<sup>29</sup>

75. Notwithstanding its stated concern on these points, the Department nevertheless agreed it would be possible to formulate a statutory duty to ensure the availability of guidance in such a way as to avoid the difficulties described above. Article 50(1) of the draft Order laid before the House on 17 March 2005 would therefore, quite simply, impose a duty on the Secretary of State to ensure that such guidance as he considers appropriate is available to assist responsible persons in the discharge of their duties under the Order. The article also specifically provides that his duty in this respect shall be discharged where guidance is available prior to the Order coming into force and the Secretary of State considers that guidance to be appropriate for the purpose mentioned in article 50(1).

### *Our assessment*

**76. We welcome the Department's addition of the new article 50 to the draft Order; we consider it appropriately establishes a duty on the Secretary of State to ensure the availability of guidance to assist responsible persons. We do not consider it will give rise to any of the difficulties previously entertained by the Department.**

### **Other amendments**

77. The Department has made a number of other amendments to the drafting of the Order which do not arise from recommendations made either by us or by the House of Lords Delegated Powers and Regulatory Reform Committee and these have been described and explained in the explanatory statement.<sup>30</sup> Other than in respect of amendments the Department has made following the passage of the Housing Act 2004, we make no further comment on these changes, none of which, we believe, give rise to any difficulty.

### **The Housing Act 2004 and the application of the two year rule**

78. In its explanatory statement the Department notes that section 53 of the Housing Act 2004 amends a number of statutory provisions which Schedule 2 to the Order would further amend and that section 1(4) of the Regulatory Reform Act may therefore be engaged.<sup>31</sup> Section 1(4) precludes the amendment by regulatory reform order of any statutory provision which has been amended, otherwise than merely for consequential or incidental purposes, within two years prior to the date on which the order is made. The explanatory statement<sup>32</sup> and the annex to it discuss the issue in detail and set out the Department's reasons for concluding that section 1(4) does not preclude the amendments

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29 Annex B, paragraph 20

30 Explanatory statement, paragraphs 110 to 128

31 Explanatory Statement, paragraph 123.

32 Explanatory Statement, paragraphs 124 to 127.

made by Schedule 2 to the draft Order. In essence the Department's contention is that, although the amendments made by the Housing Act 2004 are not merely consequential or incidental, the provisions they amend can properly be regarded as different from those which the draft Order would amend.

79. We have considerable doubts whether the Department's arguments are correct. But we see no need to explore them further here because in our view the relevant amendments made by section 53 of the Housing Act 2004<sup>33</sup> are made merely for consequential or incidental purposes within the meaning of section 1(4) of the Regulatory Reform Act. **We therefore accept (albeit for different reasons) the Department's conclusion that section 1(4) does not preclude the further amendments to the same provisions by Schedule 2 to the draft Order.**

## 3 Other representations made on the proposal

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### House of Lords Committee on Delegated Powers and Regulatory Reform

80. The House of Lords Delegated Powers and Regulatory Reform Committee reported on 26 July 2004 recommending three changes to the proposal.<sup>34</sup> The Committee was of the view that, for the Order to maintain necessary protection, article 26 should be amended to provide that the Secretary of State must issue guidance to fire authorities on their enforcement of the provisions of the Order, he must monitor the enforcement activities of fire authorities and that he may issue directions to fire authorities on the carrying out of their enforcement activities.

81. The Committee recommended that the Fire Precautions (Sub-surface Railway Stations) Regulations 1989 (as amended) should be retained in force in order to maintain necessary protection.

82. The Committee was concerned at the Department's proposed designation of articles 9 to 22 of the draft Order as subordinate provisions. In its view, these provisions, which carry much of the substance of the policy of the Order, went too near its heart for them to be so designated. It therefore recommended that article 51, which effected this designation, should be excluded from the Order in the form which was proposed.

83. The Committee also sought an assurance from the Department that, should the Order proceed and the law in England and Wales be reformed as the Department propose in the Order, those matters of law in Scotland which parallel provisions to be amended by the Order in England and Wales but which are outside the legislative competence of the Scottish Parliament, and hence incapable of reform by means of the intended Fire (Scotland) Act of the Scottish Parliament, would be made consistent with the proposed reformed fire safety regime as soon as possible.

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33 These are the amendments in subsections (1), (3) and (4) of section 53

34 Twenty-Seventh Report from the House of Lords Select Committee on Delegated Powers and Regulatory Reform, Session 2003-04, HL 153

## Other representations

84. The Department did not receive any additional representations about the proposal during the period of initial Parliamentary scrutiny.<sup>35</sup> It states that it has taken note of representations received about “Committee recommendations” when considering its response to our report but gives no indications concerning the origin and substance of these representations or of what account was taken of them in practice in framing the draft Order.

# 4 Handling of the proposal

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## Relationship with fire safety law in Scotland

85. In our report on the proposal, we considered that it would be important that reforms to the law governing fire safety in England and Wales, and to the law in Scotland, be made so far as possible simultaneously, to avoid a burden being otherwise placed on businesses operating in both jurisdictions in their having to comply for a time with two different fire safety regimes. We therefore recommended that the proposed Order and the intended Scottish Parliament Bill, if approved, should have a common commencement date. The House of Lords Delegated Powers and Regulatory Reform Committee expressed a similar view.<sup>36</sup>

86. The Department states “...[it] wishes to assure the Committees that ODPM are working closely with the Scottish Authorities to ensure that reform of general fire safety law can be achieved in full in Scotland and as close together in time as possible, subject to the processes of the two Parliaments.”<sup>37</sup> **We welcome this assurance.**

## The debate

87. We noted in our report on the proposal for this Order that the Standing Orders of the House specify those circumstances in which the House will debate draft Regulatory Reform Orders before voting on whether they should be approved. The Standing Orders do not provide that there should be a debate in circumstances where this Committee unanimously recommends that the draft Order should be approved. Although we believed the fire safety proposal was one which was fully appropriate for introduction by delegated legislation, we nevertheless considered that this Order was of such magnitude, and the subject of such clear public importance, that it would be appropriate for the Government to find time for an adjournment debate on the subject of fire service reform. We made a recommendation to this effect in our report on the proposal.

88. The Government arranged that there should be an adjournment debate in Westminster Hall on 27 January 2004.<sup>38</sup> We were glad to note the general welcome which Members gave to this opportunity to debate the Government’s proposed Order and that the debate

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35 Explanatory statement, paragraph 109

36 HL(2003-04)153, paragraph 17

37 Explanatory statement, paragraph 85

38 HC Deb 27 January 2005 cols 133 178 WH

was felt to provide a valuable additional means by which the Government could take the measure of wider views in the House, to supplement our own formal scrutiny under our Standing Order.

89. We also consider that the debate on 27 January 2005 was of value in giving the Regulatory Reform Act procedure a wider exposure in the House than it generally receives. We hope that the Government will consider making time available for further debates in relation to Regulatory Reform Order proposals which give rise to substantial policy or legislative changes which engage the wider interest of the House.

## 5 Recommendation

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90. **In accordance with Standing Order No. 141(15), we recommend unanimously that the draft Order should be approved.**

# Formal minutes

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**Wednesday 23 March 2005**

Members present:

Mr Peter Pike, in the Chair

Mr Russell Brown

Mr John MacDougall

Andy King

Brian White

Mr Mark Lazarowicz

The Committee deliberated.

Draft Report [Draft Regulatory Reform (Fire Safety) Order 2005], proposed by the Chairman, brought up and read.

*Ordered*, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 90 read and agreed to.

*Resolved*, That the Report be the Ninth Report of the Committee to the House.

*Ordered*, That the Chairman do make the Report to the House.

Several papers were ordered to be appended to the Report.

*Ordered*, That the Appendices to the Report be reported to the House.

[Adjourned till a day and time to be fixed by the Chairman.]

## List of written evidence

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|  |    |
|--|----|
| <b>A</b> Letter from the Committee Specialist to the Office of the Deputy Prime Minister | 24 |
| <b>B</b> Letter from the Office of the Deputy Prime Minister to the Committee Specialist | 26 |

# Appendix A

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## Letter from the Committee Specialist to the Office of the Deputy Prime Minister

### Draft Regulatory Reform (Fire Safety) Order 2005: request for information

The Committee considered this draft Regulatory Reform Order at its meeting today and resolved to seek further information from the Department in accordance with Standing Order 141 (14)(c). The issues which are of concern to the Committee are set out below, with questions on which the Committee would be glad to have your comments.

#### Article 29

The Committee notes that paragraph (1) of Article 29 of the draft Order provides that the enforcing authority may serve an alterations notice on the responsible person or any other person mentioned in Article 5(3). Paragraphs (3) and (5) of Article 29, on the other hand, impose duties only on the responsible person.

May I ask for the Department's response to the following question:

- Q 1** Should "the responsible person" in those paragraphs read "the person on whom the notice is served"? If not, what would be the purpose of serving a notice on any other person mentioned in article 5(3) (given that no duties are imposed on him under the article) and how does the article ensure that, where a notice is served on another person, the responsible person (on whom duties are imposed where a notice "has been served in respect of the premises") is aware of the notice where that notice is not also served on him?

#### Fire Precautions (Sub-Surface Railway Stations) Regulations 1989

The Committee noted that the draft Order omits the provision contained in the proposal for the Order which would revoke the Fire Precautions (Sub-Surface Railway Stations) Regulations 1989 (and amending Regulations). On the basis that these Regulations would subsist once the Order was in force by virtue of section 17(2)(b) of the Interpretation Act 1978, please can the Department explain:

- Q 2** How would a breach of them continue to be an offence (the Committee notes that article 32(1)(b) does not state that it applies to regulations *having effect as if made under article 24 of the Order*); and
- Q 3** If article 32 applies, would not a necessary protection be lost by virtue of the need to prove that a contravention places relevant persons at risk of death or serious injury, given that any breach of regulations 4 to 11 of the 1989 Regulations is an offence under section 12 of the Fire Precautions Act 1971?

#### Provision of guidance on the application and interpretation of the Order

The Committee considered carefully the responses made by the Department to its recommendations which address the issue of the provision of guidance on the Order.

The Committee noted the Department's reasons for its decision not to amend article 26 of the draft Order.

The Committee took note of the Department's assurance given at paragraph 78 of the explanatory statement laid with the draft Order, that guidance will be issued to fire authorities on the definition of the term "serious risk" as it is used in article 29 of the draft Order.

The Committee has also noted that the Department accepts the need for the Secretary of State to issue entry level guidance to users and business, to complement the detailed guidance booklets now in preparation.

The Committee was concerned, however, to note the decision of the Department not to act on its recommendation that the Order should impose a legal requirement that the Secretary of State issue guidance to users and businesses on its application and interpretation for the reason that establishing such a duty would, in its opinion, have no benefit and would be unnecessary in the light of the Department's stated intention to publish guidance. In making its recommendation, the Committee did not wish to question the assurances already given by the Minister and his officials that it is the Government's intention to issue such guidance. The issue for the Committee is not the policy intention to issue guidance, about which there is no doubt, but that the provisions of the Order – which would be the principal legislative provision governing fire safety in non-domestic premises in England and Wales, possibly for many years - should reflect the crucial importance of the availability of clear and effective guidance to the success of the Order and of the new fire safety regime it would introduce. While not doubting that the Secretary of State will wish to issue guidance, the Committee still considers that publication of the guidance should be a legal requirement.

The Committee does not understand the basis for the Department's statement at paragraph 87 of the explanatory document that a statutory requirement to publish guidance may place the Secretary of State in the position of being routinely required to give evidence in legal proceedings.

The Committee remains of the view that the Order would command greater confidence in Parliament and among the public if it was amended in accordance with the recommendation at paragraph 240 of its report on the proposal for the Order.

In the light of the Committee's continuing concern on this point, may I ask for the Department's response to the following questions:

**Q 4 Please explain why the Department considers that the provision of guidance by the Secretary of State acting under a statutory obligation may not appropriately and helpfully increase the confidence which Parliament and the public can have in the proposed Order and the intended new fire safety regime.**

**Q 5 Please indicate why the Department believes a simple statutory requirement that the Secretary of State issue appropriate guidance on the interpretation and application of the Order would mean that he might be required to give evidence in proceedings to which he is not a party.**

It will be helpful if I could have your response to the questions in this letter, and any other comments which the Department believes might assist the Committee, as soon as possible and by no later than 5 pm on Friday, 11 March. The Committee hopes to meet again before the Easter Recess to consider the draft Order.

The Chairman of the Committee will be writing to the responsible Minister, Phil Hope MP, to inform him of the Committee's initial view on the matters raised in this letter.

*8 March 2005*

## Appendix B

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### Letter from the Office of the Deputy Prime Minister to the Committee Specialist

#### Draft Regulatory Reform (Fire Safety) Order 2005: response to request for information

1. Thank you for your letter of 8 March containing details of a number of issues raised by the Regulatory Reform Committee and asking five questions about those points. As explained in my e-mail of 11 March, I am sorry not to have met your deadline for reply and am grateful to you for agreeing to allow more time.

2. I will take each question as raised in your letter but should preface those answers by asking you to note that in the light of the Committee's concerns the Department will be withdrawing, amending and relaying the RRO in order to make adjustments to it.

**Q 1** Should "the responsible person" in those paragraphs read "the person on whom the notice is served"? If not, what would be the purpose of serving a notice on any other person mentioned in article 5(3) (given that no duties are imposed on him under the article) and how does the article ensure that, where a notice is served on another person, the responsible person (on whom duties are imposed where a notice "has been served in respect of the premises") is aware of the notice where that notice is not also served on him?

3. The Department's purpose in including persons mentioned in article 5(3) within article 29(1) was not to impose a duty on the person mentioned in article 5(3). Rather it intended to provide a mechanism to ensure, so far as reasonably possible, that all responsible persons and persons mentioned in article 5(3) with responsibilities in respect of the safety of the building are aware of the terms of the notice. The intention was to assist responsible persons and persons mentioned in article 5(3) to comply with the duty to co-operate etc. under article 22 and to assist in ensuring persons with duties under article 5(3) in respect of the premises did not unwittingly undertake works which would place the responsible person in breach of the alterations notice.

4. However, in the light of your letter the Department accepts that article 29 as drafted in the draft Order laid before the Committees on 7 March did not make this clear and may have had unforeseen consequences.

5. Consequently, the Department will redraft article 29 so that notices are not served on persons mentioned under article 5(3) but that the alterations notice may include a specific clear requirement on the responsible person to notify other persons with responsibilities in respect of the premises of the existence and terms of the alterations notice which has been served. The Department believes this will address the concerns we believe the Committee has and will also address the Department's desire that the law should help clarify the essential need for co-operation between responsible persons and persons mentioned under article 5(3) in respect of high risk premises and so help to avoid unwitting actions which may place persons at risk.

#### Fire precautions (Sub-surface Railway Stations) Regulations 1989

**Q 2** How would a breach of them continue to be an offence (the Committee notes that article 32(1)(b) does not state that it applies to regulations *having effect as if made under article 24 of the Order*); and

**Q 3** If article 32 applies, would not a necessary protection be lost by virtue of the need to prove that a contravention places relevant persons at risk of death or serious injury, given that any breach of regulations 4 to 11 of the 1989 Regulations is an offence under section 12 of the Fire Precautions Act 1971?

6. The Department sets out below a full explanation of its approach to the Fire Precautions (Sub-Surface) Regulations 1989 (the Sub-Surface Regs).

7. The Department did consider whether any express saving needed to be made for the Sub-Surface Regs.

8. The Department took the view that the RRO is a form of subordinate legislation for the purposes of section 23(1) of the Interpretation Act 1978 (the 1978 Act), as this is an order within the definition of subordinate legislation (see section 21(1) of the 1978 Act).

9. It was content that section 23(1) applies in relation to section 17 (and saw nothing in section 17 which indicated the contrary intention). The Department concluded that section 17(2)(b) of the 1978 Act would apply in relation to the RRO. The effect of this was that any subordinate legislation made under section 12 of the Fire Precautions Act (the 1971 Act) which could have been made under article 24 of the RRO has effect as if it was made under article 24.

10. As far as criminal offences are concerned the Department considers that article 32(1)(b) applies equally to any new regulations made under article 24 and any original regulations made under section 12 of the 1971 Act (to the extent that they are within the scope of the power in article 24).

11. For example, regulations 4 to 11 of the Sub-Surface Regs could all have been made under the power in article 24 of the RRO. They will, therefore, take effect as if made under that article once the RRO comes into force.

12. Regulation 13(3) of the Sub-Surface Regs could not, however, have been made under article 24 of the RRO. Therefore, it will not take effect as if made under article 24. The result is that once the order comes into force it will still be an offence to fail to comply with the requirements under regulations 4 to 11 but that offence will arise by virtue of article 32(1)(b) of the RRO not by virtue of regulation 13(3) of the Sub-Surface Regs. The above explains, in relation to question 2, why the offence under those regulations takes effect under article 32(1)(b) of the RRO. However, the Department notes the nature of the Committee's question and will take the opportunity to amend article 32(1)(b) to make it clear that that article applies to regulations having effect as if made under article 24 of the Order.

13. In relation to question 3, the Department considers that the above approach is all that is needed. The Department, whilst noting that regulation 13(3) is widely drawn, also note that there may not be a need to prosecute where there is no risk of death or serious injury. Even with strict liability offences there will be, on the part of the enforcing authorities, qualitative decisions to be made as to whether a prosecution should be commenced. In other words, not every failure to comply with the requirements under regulations 4 to 11 will necessarily result in a prosecution or a successful prosecution. The fact that the offences under the RRO are drawn specifically to underpin the proposed new risk based fire system does not mean that they will be less effective. The Committee considered the approach taken to offences in article 32 of the RRO and took the view that the dual options of prosecution (in that article) and the service of enforcement notices adequately retained the level of necessary protection provided by the Fire Precautions Act 1971 (the Committee is referred to paragraph 112 of its 11<sup>th</sup> Report of Session 2003-04).

14. The purpose of the Sub-Surface Regs is to prevent the risk of death and serious injury arising. In the Department's view the RRO would achieve that purpose (and would do so when linked to other legislation, such as the Railway Safety Case Regulations 2000 even if the Sub-Surface Regs had been repealed).

15. The stated aim of the RRO to reform the fire legislation is to ensure that there is consistency and to try and create one clear fire safety regime. The approach explained above is a step in that direction to ensure that there is a consistent approach to offences in relation to fire safety. In time, the Department has stated in paragraph 37 of its Explanatory Statement that once substantive guidance is in place (and consultation has taken place on that guidance) the Sub-Surface Regs will be repealed.

16. For the above reasons the Department takes the view that the necessary protections for those at risk are retained.

## Provision of guidance on the application and interpretation of the Order

- Q 4** Please explain why the Department considers that the provision of guidance by the Secretary of State acting under a statutory obligation may not appropriately and helpfully increase the confidence which Parliament and the public can have in the proposed Order and the intended new fire safety regime.
- Q 5** Please indicate why the Department believes a simple statutory requirement that the Secretary of State issue appropriate guidance on the interpretation and application of the Order would mean that he might be to give evidence in proceedings to which he is not a party.

17. The Government accepts that it is good practice to issue guidance, and accepts its obligation to inform the public about the law and what it means to them. The Government has declared its commitment to publish guidance on the RRO. It is involving stakeholders in that guidance, and it will run a publicity campaign to publicise the RRO and the existence of guidance in advance of it coming into force. In view of the above, the Department believes that it has taken and will continue to take the necessary practical steps to ensure that there is public confidence in the new fire safety regime. Therefore, the Department considers that inserting a statutory duty into the RRO may, of itself, only have a marginal effect on public confidence.

18. The Department does have concerns that any statutory duty to issue guidance could extend to an obligation to provide detailed specific advice tailored to individual premises cases at the request of individual members of the public. This is at the root of the concern expressed at paragraph 87 of the Explanatory Statement about legal proceedings. It would be undesirable if, however comprehensive the Secretary of State's guidance, he was always vulnerable to the challenge that he had not issued guidance on a particular aspect of the provisions and so had not fulfilled the duty. This could militate against concise, focussed guidance.

19. From our discussions with business representatives, it is clear that business wants guidance that is effective and focussed and easy to use in order to help responsible persons to carry out their duties. So voluminous guidance, which could result from the proposed statutory duty, would not be welcomed by business.

20. It is also of great concern to the Department that a duty which specifically requires the Secretary of State to publish guidance may effectively prevent the Secretary of State from accepting guidance about fire precautions which is produced by others - or at least require him to re-publish it in order to meet the duty. This would be difficult as much of the copyright is not owned by the Crown and others have commercial interests in selling their guidance. Also, there is a great deal of wholly appropriate guidance on fire precautions already available - such as that produced by insurers, the Health and Safety Commission and the British Standards Institution. It would for example be inappropriate to attempt to re-publish the British Standard on fire safety engineering - which is the wholly appropriate and nationally recognised guidance for development of fire safety engineering based fire precautions solutions for complex premises.

21. Nonetheless, the Department recognises the Committee's desire to ensure suitable guidance which will assist responsible persons in understanding the nature and extent of their duties and obligations under the proposed RRO is available. Despite the points made in the preceding paragraphs, the Department believes that it will be possible to devise a formulation of a statutory duty which would largely overcome the pitfalls it has identified. Such a duty would focus on a requirement for guidance designed to help responsible persons to determine how to fulfil their duties under the Order, which is our understanding on the Committee's concern. The Department will amend the RRO to include such a provision.

*17 March 2005*

## Reports from the Regulatory Reform Committee in the last Session of Parliament

### Session 2003-04

|                       |   |      |
|-----------------------|---|------|
| First                 | Proposal for the Regulatory Reform (Sunday Trading) Order 2004  | 108  |
| First Special Report  | Government Response to the Committee's First Special Report, Session 2002–03: <i>The operation of the Regulatory Reform Act 2001: a progress report</i> | 256  |
| Second                | Proposal for the Regulatory Reform (Patents) Order 2004   | 337  |
| Third                 | Draft Regulatory Reform (Sunday Trading) Order 2004   | 338  |
| Fourth                | Proposal for the Regulatory Reform (Museum of London) (Location of Premises) Order 2004   | 414  |
| Fifth                 | Proposal for the Regulatory Reform (National Health Service Charitable Trust Accounts and Audit) Order 2004   | 438  |
| Sixth                 | Proposal for the Regulatory Reform (Local Commissioner for Wales) Order 2004  | 553  |
| Seventh               | Draft Regulatory Reform (Museum of London) (Location of Premises) Order 2004  | 594  |
| Eighth                | Draft Regulatory Reform (Patents) Order 2004  | 683  |
| Second Special Report | Draft Regulatory Reform (Museum of London) (Location of Premises) Order 2004  | 818  |
| Ninth                 | Proposal for the Regulatory Reform (Trading Stamps) Order 2004  | 817  |
| Tenth                 | Draft Regulatory Reform (Local Commissioner for Wales) Order 2004   | 900  |
| Eleventh              | Proposal for the Regulatory Reform (Fire Safety) Order 2004   | 684  |
| Twelfth               | Proposal for the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2004                     | 1056 |
| Thirteenth            | Draft Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2004                                | 1246 |
| Fourteenth            | Proposal for the Regulatory Reform (Execution of Deeds and Documents) Order 2004  | 1271 |



## Previous reports from the Regulatory Reform Committee in the present Session of Parliament

### Session 2004-05

|                |   |     |
|----------------|---|-----|
| First          | Proposal for the Regulatory Reform (Joint Nature Conservation Committee) Order 2005   | 117 |
| Second         | Proposal for the Regulatory Reform (Registration of Births and Deaths) (England and Wales) Order 2004                       | 118 |
| Third          | Proposal for the Regulatory Reform (Prison Officers) (Industrial Action) Order 2004   | 148 |
| Fourth         | Draft Regulatory Reform (Joint Nature Conservation Committee) Order 2005  | 270 |
| Fifth          | Draft Regulatory Reform (Prison Officers) (Industrial Action) Order 2005  | 271 |
| Sixth          | Draft Regulatory Reform (Trading Stamps) Order 2005   | 272 |
| First Special  | Operation of the Regulatory Reform Act 2001   | 273 |
| Seventh        | Draft Regulatory Reform (Execution of Deeds and Documents) Order 2005   | 429 |
| Eighth         | Draft Regulatory Reform (National Health Service Charitable and Non-Charitable Trust Accounts and Audit) Order 2005         | 430 |
| Second Special | Government Response to the Committee's First Special Report of Session 2004-05: Operation of the Regulatory Reform Act 2001 | 431 |

All reports are available from The Stationery Office.