

## ANNEX

### NOTE ON SEVERING THE PROVISIONS TO BE AMENDED BY THE REGULATORY REFORM (FIRE SAFETY) ORDER AND THE HOUSING ACT 2004

#### Background to the issue

1. Section 53 of the Housing Act 2004 (the Housing Act) amends provisions in a number of local and general Acts in relation to fire hazards. The amendments remove powers currently available to local authorities when dealing with fire hazards in particular dwelling houses. These amendments are not consequential on the Housing Act but the Department wanted to remove these powers to ensure that in future local authorities deal with fire hazards in relation to all dwelling houses through the Housing Health and Safety Rating System under Part 1 of the Housing Act. Neither section 53 nor Part 1 of the Housing Act have been brought into force.

2. The draft Regulatory Reform (Fire Safety) Order (the draft RRO) removes the powers available to local authorities when dealing with fire hazards in other particular (mainly non-residential) premises. These amendments ensure that in future all premises covered by the draft RRO (RRO premises) should be dealt with under that RRO. Both sets of amendments were drafted on the basis that the other amendments may not come into force. See paragraph 11 below for a list of the RRO provisions at issue.

3. Section 35 of the London Building Act (Amendment) Act 1939 (c. xcvi) (the 1939 Act) is set out below to illustrate the issue (the passages shown in bold are the draft RRO amendments and those shown in italics are the amendments proposed by the Housing Act):

“(1) Where an old building -

(a) **except a dwelling-house occupied as such by not more than one family-**  
(i) **contains any storey which is at a greater height than forty-two feet; or**  
(ii) **is a building in which sleeping accommodation is provided by more than twenty persons or which is occupied by more than twenty persons or in which more than twenty persons are employed; or**

(b) **is a building in which more than ten persons are normally employed at one time above the first storey or on or above any storey which is at a greater height than twenty feet; or**

(c) exceeds two storeys in height and contains any storey which is at a greater height than twenty feet and-

*(i) is let in flats or tenements; or*

**(ii) is used as an inn hotel boarding house hospital nursing home boarding school children’s home or other institution; or**

**(iii) is used as a restaurant shop store or warehouse and has on any storey above the ground storey any sleeping accommodation; or**

**(d) contains a place of assembly having a superficial area of not less than five hundred square feet;**

the Council if in their opinion after consulting the fire and rescue authority the building is not provided with proper and sufficient means of escape therefrom in case of fire may at any time serve upon the

owner of the building a notice requiring him to provide such means of escape as in the circumstances of the case can be reasonably required:

Provided that.....”

There are also subsections (2) to (5) to section 35.

### **Section 1(4) Regulatory Reform Act 2001 (the 2001 Act)**

4. The Department accepts that the amendments proposed by section 53 of the Housing Act are not merely consequential or incidental. Although the intention of section 1(4) of the 2001 Act is that RROs are not meant to change or undo something recently decided by Parliament itself, there seems to be no reason to suppose that where a section has been amended for one purpose, an RRO is precluded from making an unrelated change. There are two arguments which can be advanced to support such an approach.

5. The first is the more straightforward point. A subsection, paragraph or sub-paragraph in a particular section can be treated as separate provision in relation to another subsection, paragraph etc in that section (or that one section is a separate provision to another section). Taking section 35(1) of the 1939 Act, the Department considers that paragraph (c)(i) (which covers the residential element) is a provision which is separate from paragraph (c)(ii) and (iii) which concern the non-residential elements (albeit that they can be viewed as a subset of paragraph (c)). Sub-paragraph (i) (of paragraph (c)) is not dependent upon the sub-paragraphs which follow.

6. Secondly, in the alternative, the Department consider that it is possible to argue that the “provision” for the purposes in section 1(4) is not any particular section or subsection so much as a severable legal proposition. So that if it is possible to separate out the legal propositions in the existing text, an amendment to one separate proposition in the last two years should not preclude an amendment to unrelated propositions. In order for the Department to proceed along the lines outlined above, it will be necessary to show that the amendments in question in Schedule 2 to the draft RRO are not reforming the law contained in a provision of the relevant Acts that are to be amended by the Housing Act. The Department consider that this can be established by looking at the amendments of the draft RRO and Housing Act separately.

7. Taking section 35 of the 1939 Act as an example, is section 35(1) (c) (i) (the Housing Act amendment) severable from the RRO amendments so as not to destroy the meaning of that section? Paragraph (c)(i) consists of a severable legal proposition. If one relates the purpose of the amendment to the legal proposition, then as the purpose of the Housing Act amendment is to remove the power from the Council to serve a notice in respect of an old building which exceeds two storeys and which contains any storey which is higher than 20 feet and is let in flats or tenements that is a separate purpose (and therefore, proposition) from paragraph (c)(ii) and (iii) (which relate to non-residential premises).

8. In either case, severability is achieved because in repealing paragraph (c)(i), the ability of a Council to serve a notice in respect of domestic premises due to defective means of escape is removed, but (in the absence of the RRO amendments) the Council would still be left to enforce means of escape in respect of non-residential premises.

9. Both the arguments advanced in paragraphs 5 and 6 in respect of section 35(1)(c)(i) of the 1939 Act apply with equal force to the amendments to section 72 of the Building Act 1984 and to section 54 of the Leicestershire Act 1985 (see the table in paragraph 11 below. However, the Department recognises that the argument is weaker in respect of the amendments to sections 36(1) and 37(1) to the 1939 Act. This is because the draft RRO disapplies the whole section whereas the Housing Act amends parts of those sections to remove the domestic element. Therefore, it is not possible to utilise the argument set out in paragraph 5 above and treat the provision to be amended as a separate provision in relation to the draft RRO and Housing Act amendments. Notwithstanding that concession the Department does take the view that the Housing Act and RRO amendments deal with separate legal propositions (see the argument set out in paragraph 6 above) - the reform of enforcement of fire hazards in domestic premises and, separately, in relation to other (RRO) premises.

10. The Department does concede that there are limits to the “severable provision” argument. The Department cannot argue severability in respect of the amendments it had originally proposed to sections 48 and 49 of the County of Merseyside Act 1980 and section 365 of the Housing Act 1985 because the Housing Act repeals these sections as whole and would remove amendments made by the draft RRO or make them entirely otiose depending upon the timing of the amendments. Therefore, these amendments have been removed from Schedule 2 to the draft RRO.

11. The amendments proposed under the RRO which are at issue are as follows:

<b>ACT</b>	<b>Paragraph number in Schedule 2 of the draft version of the RRO laid on 10<sup>th</sup> May 2004.</b>	<b>RRO AMENDMENT</b>
<b>London Building Acts (Amendment) Act 1939</b>	Paragraph 2	
Section 35	Paragraph 2(4)	In section 35(1) omit paragraphs (a), (b), (d)
		In section 35 (1)(c) omit (ii) & (iii)
		In section 35 omit subsection (5).

Section 36	Paragraph 2(5)	In section 36 (1) omit “Where any portion” and substitute “Subject to...” etc and insert new subsection disapplying any building to which the RRO applies.
Section 37	Paragraph 2(6)	In section 37(1) for paragraph (b) substitute:  “(b) every other building except...” etc. <b>Amended in the version of the draft RRO re-laid before Parliament to disapply section 37 in respect of premises to which the RRO applies.</b>
<b>County of Merseyside Act 1980</b>	Paragraph 14	
Section 48	Paragraph 14(3)	Substitute section 48 (3)(a)  Omit paragraphs (b) to (d) of subsection (3)  In subsection (9) omit the words “fire authority as well as the”.
Section 49	Paragraph 14(4)	In section 49(1) (a) substitute “Any means of escape” with “subject to subsection (1A), any means of escape”.  After subsection (1) insert;  “(1A) This section does not apply in relation to a building or part of a building to which the Regulatory Reform (Fire Safety) Order applies.”
<b>Building Act 1984</b>  Section 72	Paragraph 33(5)	Omits section 72(b) and (c)
<b>Leicestershire Act 1985</b>	Paragraph 38(5)	Omit the word “or” at the end of section 54(6) (a) and the following

Section 54		words to the end of the subsection.
<b>Housing Act 1985</b> Section 365	Paragraph 36	Amends section 365

12. In summary the Department takes the view that, save for the provisions mentioned in paragraph 10, the above amendments do not offend against section 1(4) of the 2001 Act.

13. For the sake of completeness it may be worth pointing out that it is the Department's intention at this stage to wait until the draft RRO is in force before commencing section 53, as this will enable it to use the consequential power in section 265 of the Housing Act to make consequential amendments to remove any otiose or hanging provisions left behind once the amendments under the Housing Act and RRO have been made. For example, in section 35 of the 1939 Act, once those amendments have been made a wide power is left to the Council to serve a notice in respect of means of escape in any old building which "exceeds two storeys in height and contains any storey which is at a greater height than twenty feet". This wide hanging power is an unintended consequence of the Housing Act amendment once it has been made and should be removed.