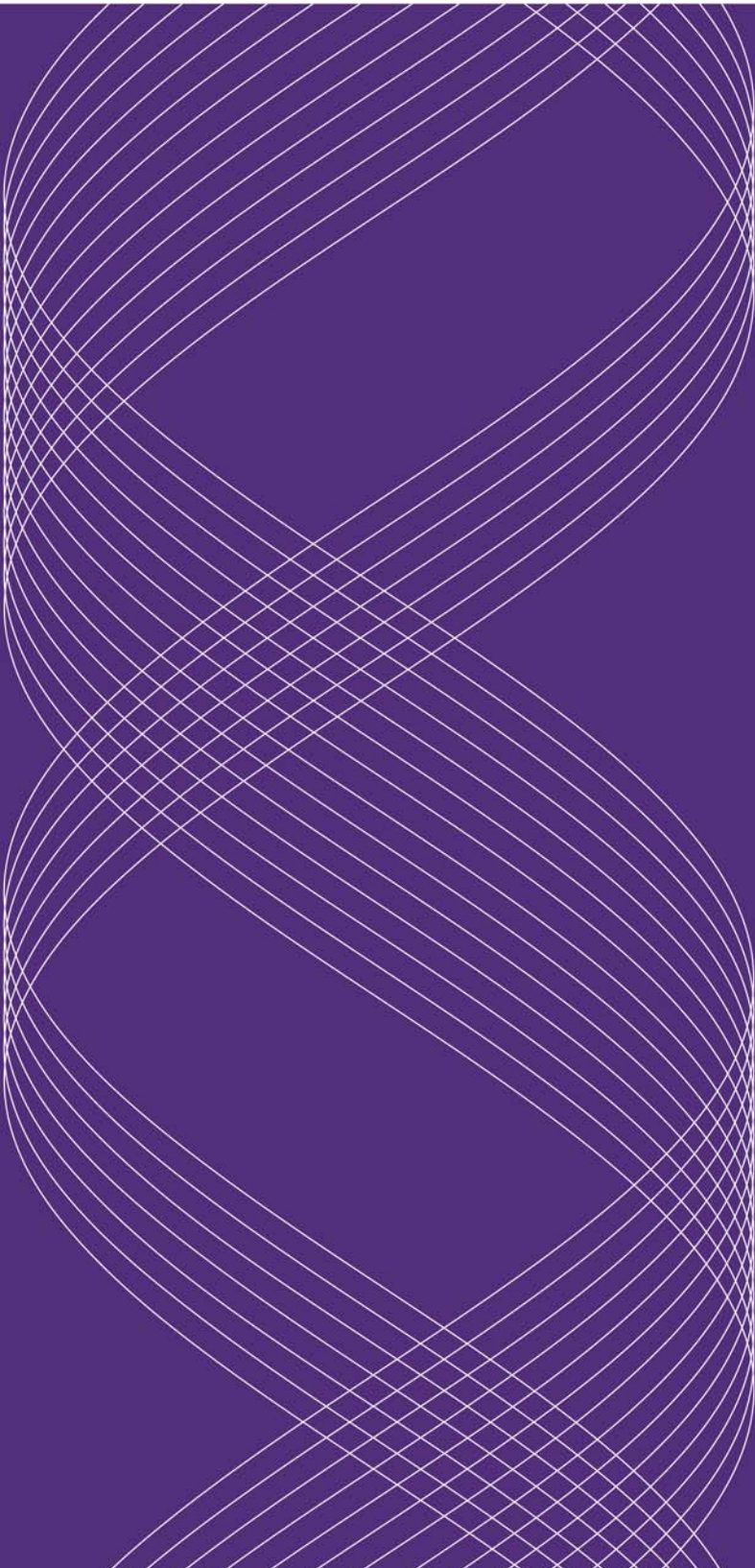




# A Bill for Better Regulation Summary of Consultation Responses





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## Introduction

In March 2005 two independent reports on regulation were published: the Better Regulation Task Force's *Regulation - Less is More*, and Philip Hampton's *Reducing Administrative Burdens: Effective Inspection and Enforcement*. The Government immediately accepted all recommendations in both reports and published a detailed response in July.

Amongst other things, the Better Regulation Task Force report proposed that the Government establish a rolling programme of simplification of existing regulations, and set targets to reduce administrative burdens on business. The report also suggested that the Government should consider whether an extended Regulatory Reform Act could be used to deliver these simplifications.

The Government's *Review of the Regulatory Reform Act 2001*, published in July, found that although the Regulatory Reform Act (RRA) had enabled the delivery of 27 Regulatory Reform Orders (RROs), the RRA powers are narrow and technical. The concept of burdens is complex and puts a heavy analytical workload on departments. It also skews the preparation and scrutiny of RROs towards the identification and analysis of specific legal restrictions, rather than the overall regulatory benefits of reforms. As a result, the RRA has proved a less effective tool for delivering better regulation proposals than envisaged.

Philip Hampton's report recommended a set of principles for regulatory inspection and enforcement, based on risk and proportionality. It also recommended that private sector regulatory structures should be simplified, and that the Government should commission a review of private sector penalty regimes.

Building on these three documents, *A Bill for Better Regulation: Consultation Document* proposed amendments to the RRA to improve RROs, and legislative changes to implement some of the Hampton recommendations.

## Overview

The Government conducted a 12 week consultation exercise to gain views on the draft proposals to amend primary legislation by means of secondary legislation. The Government consulted on extending the limited power under the RRA, updating the enforcement concordat and streamlining regulatory structures.

The Government received 77 responses to the consultation document, *A Bill for Better Regulation*, from private and public sector organisations, as well as individuals. Many respondents took the opportunity to welcome the draft Bill and supported the Government's initiative in this area. A full list of respondents, with the exception of the consultees who requested that their responses be kept confidential, can be found in Annex A.

A series of 7 regional visits were held in England to explain the programme of regulation to key stakeholders. These sessions provided a variety of views on regulation and have proved complementary to the consultation.

There were a large number of useful comments and suggestions which have helped in finalising policy for the Bill. This document provides a summary and selection of these contributions, together with a response by the Government to the points raised.

Respondents expressed strong support for proposals outlined in the consultation document to extend RRO powers. The results of the consultation reveal no significant differences of opinion between the public and private sectors in their approach to the Government's recommendations for regulatory reform.

Regarding the implementation of the Hampton report, the majority of respondents welcomed proposed measures to update the Enforcement Concordat in accordance with the Hampton principles and to streamline regulatory structures. Businesses and regulators were divided on whether the new Concordat should be made statutory – regulators were generally opposed, businesses generally in favour. Those who wanted a non-statutory code expressed a desire to trial the code as a voluntary arrangement before considering whether it should be made statutory.

There was a lower response to the questions posed on structural reform and penalty reform powers. Respondents generally supported the principles of structural and penalty reform set out in the Hampton report, but did not closely engage with the specific nature of the powers proposed.

## Specific Questions

### Chapter 1: Regulatory Reform Order proposals

#### Burdens, simplification and Law Commission proposals Recommendation One

*Orders under the amended Regulatory Reform Act 2001 (RRA) should be able to amend or repeal primary legislation in order to do one or more of the following three things:*

- *remove, reduce, re-enact or impose burdens (as now);*
- *simplify legislation; and/or*
- *implement uncontroversial Law Commission recommendations.*

*We would like this power to be as flexible as possible while still reflecting the safeguards and working within appropriate procedures. We recommend that the simplification and Law Commission powers should not be linked to the removal or reduction of burdens.*

#### **Questions**

- **Do you think it is appropriate that Regulatory Reform Order (RRO) powers should be extended to allow the implementation of simplification measures and uncontroversial Law Commission reports?**
- **Are there other ways in which the powers should be widened in order to enable the delivery of better regulation and law reform measures?**
- **Do you agree that the simplification and Law Commission powers should be separate from the burdens element?**

#### *Extending RRO powers*

There was overwhelming support for extending RRO powers to allow the implementation of simplification measures and uncontroversial Law Commission reports. Business organisations were particularly concerned that RRO powers should go further than the current ability to amend legal burdens (i.e. burdens as narrowly defined in the RRA), and should be able to remove or reduce burdens in the wider sense of the administrative bother or expense associated with a regulation. For example, the Institute of Directors stated that “The RRO system should certainly be extended to include simplification measures. Indeed, most business people would be surprised to discover that these are not covered by the RRO system already”.

Some respondents expressed concern over how “non-controversial” Law Commission recommendations would be defined. This issue is addressed on page 19.

### *Examples of simplification*

Eighteen respondents provided helpful examples of areas of law which might be simplified by RRO. These proposals will now be forwarded to relevant Government departments, where a decision will be made as to whether the proposals will be taken forward and fed into departmental simplification plans. Respondents will be kept informed about the progress of their proposals by departmental policy officials.

### *Power to amend legislative burdens*

The consultation document proposed that RROs which simplify or implement Law Commission reports should not necessarily need to remove or reduce a burden as narrowly defined in the RRA. Otherwise the new powers would not be significantly wider or more flexible than the current system, and the workload would still be significant, as proposals would still need to be exhaustively analysed in terms of burdens within the meaning of the RRA. Consultees strongly agreed that RROs should be able to simplify or implement Law Commission recommendations without necessarily reforming legislation which imposes burdens.

A number of business groups held views similar to the Bio Industry Association, who said that RROs should become “an outcome-focused tool for the effective delivery of better regulation. The focus should indeed be on the overall benefits delivered, such as reduced costs and increased efficiency, rather than on the individual burdens reduced or removed”.

A number of legal organisations also believed that the concept of burdens had inhibited the success of the RRA; for instance the Law Commission believed that burdens “introduces complexity and a degree of artificiality” to reforms. The Law Society suggested that RROs should “take a more holistic or strategic view”. Both the Law Society and the Law Commission suggested that the new legislation might be more useful if the concept of burdens were removed. On a related point, the Small Business Council said that they “support the broad thrust of the proposals...but still have concerns that some of the processes will remain complex”. The Law Commission proposed that “the Government might wish to consider whether a more generally described power would be preferable”.

### *Next steps*

The Government’s aim is to achieve an outcome-focussed power. The consultation document proposed doing this by keeping the current power to amend burdens and supplementing this with a power to simplify and a power to implement Law Commission recommendations.

While widening the powers, this approach would effectively complicate the application of powers, requiring departments to test their proposals by reference to three different sets of criteria instead of a single set relating to burdens as present. Departments would need to consider whether their proposals fall under the Law Commission, burdens or the simplification power and, if the proposal fits under more than one, which of the strands they should follow in relation to which proposals. The current powers are already seen as excessively complex and burdensome, both by those responding to the public consultation, and policymakers in Government departments.

The Lords Delegated Powers and Regulatory Reform Committee has also commented on the complex nature of RROs, stating that “the regulatory reform process is an onerous one”.<sup>1</sup> In relation to the Prison Officers Industrial Action RRO, the committee commented that “the complexity of this debate is evidence of a difficulty we have observed on previous occasions in applying the 2001 Act rests and, in particular, determining what may constitute a new or re-enacted burden.”<sup>2</sup>

This three-strand approach would not get away from the concept of burdens as narrowly defined in the RRA, which was considered too limited by most respondents, and characterised as “over-technical” by the Law Society. The need to define and pin down the simplification power by reference to subsets such as consolidation and clarification risks creating the same burden of analysis, and the same kind of rigidities, which currently arise from the definition of burdens. The Law Commission commented that “it is important however not to see this list [of types of simplification] as exhaustive.”

Although this approach would produce a wider and more flexible power than that currently available under the RRA, the Government has further considered the practicalities involved in the application of the power and, coupled with the concerns expressed in the consultation, considers that the power as proposed at consultation would not deliver the desired change. **Instead, the concept of burdens has been removed, and new Orders should be delivered under a general power to reform legislation. This power will be limited by a series of safeguards similar to those in the RRA and other limitations.** There will also be a requirement that the explanatory document that the Minister lays before Parliament explains (where appropriate) how certain better regulation aims will be furthered (these aims include: modernising or simplifying the law, and making the overall effect of the law less onerous). This power will also be ultimately subject to the role of the Parliamentary Committees.

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<sup>1</sup> House of Lords Delegated Powers and Regulatory Reform Committee, 1<sup>st</sup> Report of Session 2003 – 04. Special Report Sessions 2001 – 02 and 2002 – 03: The Work of the Committee.

<sup>2</sup> House of Lords Delegated Powers and Regulatory Reform Committee, Proposal for the draft Regulatory Reform (Prison Officers) (Industrial Action) Order 2004 and Proposal for the draft Regulatory Reform (Joint Nature Conservation Committee) Order 2005, Second Report of Session 2004 – 05, HL 13

Consultation responses confirmed the Government's proposals to extend the powers of RROs to allow the implementation of simplification measures and uncontroversial Law Commission reports.

## Recommendation Two

*The reference to the need for burdens to affect someone in ‘the carrying on of an activity’ unnecessarily limits the ability to remove burdens that affect persons in a passive capacity or that relate to a one-off action. It should be removed.*

### **Question**

- **Do you agree that the reference to activity should be removed?**

No respondents specifically objected to removing the reference to activity. The Government proposes to remove this reference. This will allow Orders to remove burdens affecting people in a passive capacity and from those carrying out a one-off action.

### Recommendation Three

*The block on reforms that only remove or reduce burdens on Ministers or government departments is inconsistent with the Government's desire to improve the efficiency of public services. It should be removed.*

#### **Question**

- **Do you agree that the block on reforms that only remove burdens on Ministers or government departments should be removed?**

Respondents strongly supported the removal of the block on removing burdens on Ministers or Government departments. The Charity Commission stated that this measure “will have the potential to provide leaner and more efficient government”. A few respondents such as the Association of Chartered Certified Accountants felt that “the Regulatory Reform Act should focus on the needs of those being regulated not the regulators”. But most people agreed that reforms benefiting Ministers or government departments would also benefit tax payers by improving government efficiency. The Institute of Directors stated that “a more efficient public sector can deliver better services to business and society as a whole.”

A few respondents took a view similar to that of the National Housing Federation, which said that “we agree it should be possible to remove burdens on Government that serve no useful purpose...but we do not support the use of RRO procedure to remove ‘burdens’ that are intended to protect the position of partner organisations or the general public”.

#### *Next steps*

The consultation confirmed that the block on RROs reforming legislation relating to Ministers or government departments was unnecessary. The Government intends to remove the block on reforms that only remove burdens on Ministers or government departments.

The removal of this restriction will be matched by the retention of the safeguards. They have provided an effective mechanism to ensure a check on the exercise of power. These will ensure that reforms are proportionate, fairly balanced, and that they must also maintain necessary protections and must not remove any existing rights or freedoms which someone might reasonably expect to continue to exercise. This will prevent the removal of burdens on government from unfairly affecting individuals or other organisations.

The Simplification Power  
Recommendation Four

*Recommendation Two above proposes extending the existing powers in the RRA to include the simplification of legislation. Under this we include:*

- *the removal of unnecessary or obsolete provisions;*
- *the consolidation of legislation, i.e. the bringing together of disparate pieces of legislation, to remove overlaps and make the whole more accessible and transparent;*
- *the clarification of legislation, i.e. resolving doubts and ambiguities about its meaning;*
- *restating the law with a view to improving transparency, coherence or accessibility; and*
- *the correction of minor errors and omissions, e.g. failure to make necessary consequential provision.*

*We would like to allow substantive amendments where it can be demonstrated that they are consensus driven/uncontroversial and meet all the safeguards (see below for analysis of safeguards), and where it would inhibit the overall reforms proposed if substantive change was not allowed.*

**Questions**

- **Do you agree that proposed simplification powers should be defined in this way?**
- **Are there additional examples of simplification which we should include in the scope of the powers?**
- **Do you agree that the simplification power should allow for some substantive amendments to legislation? In what circumstances would substantive change be appropriate?**
- **Do you agree that the proposals on simplification should be able to deliver substantive change, if appropriate, where data and information sharing is necessary to remove burdens or simplify and improve processes?**
- **• Are the safeguards proposed adequate or are there specific data sharing issues that would mean additional safeguards would be necessary?**
- **• Can you identify any specific instances where responsible data sharing would remove burdens on business or others?**

Almost all respondents agreed that RROs should be able to simplify legislation in the ways outlined in the consultation document, and there was strong agreement that simplification should include changes to the substance of legislation – as well as clarifying, consolidating or restating legislation without changing its meaning. According to the Better Regulation Task Force

(BRTF), “a primary aim of the RRA should be to deliver substantive amendments. Not allowing substantive amendments may block otherwise valuable proposals from being delivered. The RRA contains several safeguards so that any reforms delivered via this route retain protection and are deemed appropriate.”

There was overwhelming agreement that RROs should be able to make substantive changes to legislation to allow data or information sharing – where data sharing was appropriate and would simplify or remove burdens. The Forum for Private Business believed that “there must be positive action to avoid unnecessary duplication of information”, and the British Chamber of Commerce noted that “improved data and information sharing is likely to be one of the major contributors to a reduction in the ‘paperwork burdens’”.

However a few respondents noted that data should only be shared “subject to sensitivity and privacy considerations”, to quote the Commercial Radio Companies Association.

#### *Next steps*

The Government has decided, in light of the support expressed by consultees, to extend existing powers in the RRA to include the simplification of legislation. **Regarding enhanced data and information sharing, the Government believes that the combination of full public consultation, safeguards and commitments not to deliver highly controversial measures by Order should ensure that personal or commercial data is not shared inappropriately.** The Parliamentary scrutiny committees would also have the ability to reject Orders which they believe to facilitate inappropriate data sharing.

Common law proposal  
Recommendation Five

*We recommend that it should be possible by Order to implement uncontroversial Law Commission recommendations, including recommendations for the reform of common law, providing that the usual safeguards are maintained.*

**Question**

- **Do you agree that there should be a power to implement Law Commission recommendations by Order and that the power should extend to proposals for the reform of common law?**

There was overwhelming support for the creation of new powers to implement Law Commission report by Order. However, some respondents were concerned that allowing Orders implementing Law Commission recommendations to amend the common law would be inappropriate. The Professional Contractors Group said that the separation of powers between legislature and judiciary is one of the key features of the constitution and the common law should only be superseded by primary legislation.

However the majority of respondents took a different view. The Law Society agreed with the Government that only changes to the common law recommended by the Law Commission should be possible by Order. The Law Commission stated that **“if the use of RROs to implement our proposals is to be effective, they must be able to include amendments to the common law.”** Only uncontroversial Law Commission recommendations would be delivered by Order.

In many cases, these recommendations would, the Commission said, be used to codify the common law. The Commission takes a holistic approach to law reform and creating barriers between different types of law which could be amended by Orders implementing Law Commission recommendations would reduce the usefulness of the power.

*Next steps*

The Government considers that Orders implementing Law Commission reports should be able to reform the common law. Proposals for delivery by Order would only be recommended if the Government considers them appropriate to be dealt with by secondary legislation; and the Committees would continue to consider whether RROs are appropriate, and may reject Orders on that basis.

Safeguard proposals  
Recommendation Six

- *We recommend that the current safeguards in the RRA should be carried forward; that these safeguards (with appropriate adjustment) should be common to all three types of Order (burdens, simplification and Law Commission recommendations); and that they should be applied across Orders in their entirety.*
- *We further recommend that the current requirement to detail the savings or increased costs estimated to result from the proposals should be replaced with a wider reference to the need, where appropriate, to provide an assessment of the significant impacts of proposals.*

**Questions**

- **Do you agree that current safeguards should be maintained and applied comprehensively across all three types of Order?**
- **Do you agree that the requirement to provide an estimate of savings or increased costs should be extended to cover a wider impact assessment where appropriate?**

*Safeguards*

A few respondents questioned whether the safeguards are objective or sufficiently rigorous. For instance the Transport and General Workers Union considered that “the so-called ‘safeguards’ affecting the use of RRO are more apparent than real... in reality they are ministerial licence to introduce RROs at will”. **However, the Minister can only make Orders if he is of the opinion that the safeguards are met, and the Parliamentary scrutiny committees can reject an Order if they disagree with the Minister’s assessment.** The safeguards have been used actively by the Committees, and for instance the RRC criticised one aspect of the Civil Registration proposals on the grounds that it did not maintain necessary protection.

The vast majority of respondents took a different view to the Transport and General Workers Union. The Law Society believed that “the existing safeguards appear to have worked”, and the Law Commission stated that “the evidence of the operation of RROs has shown that Parliament can effectively ensure that the Executive does not abuse the RRO procedure”.

Almost all respondents agreed that the current safeguards should be maintained and applied comprehensively to all Orders.

The RRA requires that the Minister proposing to make the Order must be of the opinion that it is desirable for an RRO to be made, because of the reduction or removal of burdens, or the other beneficial effects it has for people affected by the burdens imposed by the existing law. The *Review of the Regulatory Reform Act 2001* found that when departments justify proposals in reference to desirability, they often rely on the same arguments they used relating to proportionality and fair balance. Replying to the consultation, the Better Regulation Task Force questioned whether the desirability safeguards adds any value to the safeguards already provided by the proportionality and fair balance safeguards. The BRTF said that “we do not wish to suggest that the Government should remove necessary safeguards, but we do suggest that the Government consider whether this safeguard is essential. We would not support unnecessary legal hoops which add no value, and increase bureaucracy and paperwork for officials trying to deliver worthwhile reforms.”

### *Impact assessments*

There was overwhelming support for extending the current requirement to detail financial costs and savings of RROs to include the wider social and environmental impacts of proposals. South East Water noted that “RROs should be intrinsically linked to Regulatory Impact Assessments”, and indeed the extension to cover wider impacts as well as costs and benefits, and a more generally framed power, should increase the link between Orders and RIAs and better regulation as a whole. Western Power Distribution was keen that the requirement to carry out an impact assessment should *replace* the current costs and benefits requirement; this would in fact be the case, as the current costs and benefits analysis would form part of the wider impact assessment. The Council of Mortgage Lenders were concerned that this might mean that less attention would be given to financial costs and benefits; the Government believes that this would not be the case, but that financial costs would just in future be considered alongside social and environmental costs, reflecting the Government’s wider policy on impact assessment. **The Government considers that the only other objections, made by the TUC and TGWU, were based on a misinterpretation of the proposals on the scope of the impact assessment.** They thought that the proposal excluded social impacts; which is far from the case as the aim of this change is specifically to ensure that the social and environmental impacts of Orders are considered.

### *Next steps*

The Government intends to modify the current safeguards under the 2001 Act to reflect the extension of powers beyond just reforming the law imposing burdens as defined in the RRA. These safeguards will be applied comprehensively to all Orders.

The concept of burdens is an integral part of the desirability safeguard, so it would have to be reworded to fit a power not based on burdens. Based on the

review findings and the BRTF comments, the Government proposes creating a new safeguard which is substantially different from the existing safeguards. It should capture part of the aims of the better regulation agenda not covered by the existing safeguards. The Government proposes to replace the desirability test with a test to ensure that alternatives to legislation are considered before an RRO is pursued. This safeguard would require that order making powers can only be used when there is no effective alternative to legislation.

The Government also considers that extending the requirement to estimate financial costs and savings to cover wider impacts will act as a more appropriate assessment of proposed reforms.

Two-year rule proposal  
Recommendation Seven

*We recommend that the two-year rule is removed from the Act.*

**Question**

- **Do you agree that the two-year rule should be removed?**

Respondents strongly agreed that the two-year rule should be removed. Some respondents expressed concern that removing the two-year rule might increase regulatory uncertainty. It takes time for businesses and others to understand the requirements of a new law, so it is important that the law should not change too frequently.

However the two-year rule is an arbitrary and inflexible block on frequent changes to the law. One effect the two-year rule has had is to either delay or reduce the benefits brought by several RROs. For instance, the Regulatory Reform (Gaming Machines) Order 2003 was originally expected to save the industry £9.5m per year. But part of the proposals had to be dropped as the relevant provisions had been amended by a prize up-rating order, which are periodically used to increase the maximum amount certain gaming machines can pay out. This reduced the estimated savings to £1.85m per year.

*Next steps*

The Regulatory Impact Assessment process helps ensure that different courses of action are considered and that unintended consequences of policies are considered in advance, to minimise the need to change the law once in force. Orders need to be thoroughly prepared and analysed against the safeguards. The Government believes that this analysis, in addition to RIA requirements, offers a more flexible approach. We would also expect that if proposals do make changes to recently amended law, the department proposing the reform would explain why this is appropriate.

Hence the Government intends to remove the two-year rule. The BRE will continue its efforts to maintain regulatory certainty through ensuring effective Regulatory Impact Assessment for new policies.

Legislative sub-delegation proposal  
Recommendation Eight

*We recommend that RROs should be able to provide for full legislative sub-delegation provided that it can be demonstrated that proposals are consistent with the safeguards. This means that RROs would be able to create new secondary legislative powers (for example a power to make regulations) and/or extend existing powers. The department responsible for the Order would in the normal way specify whether regulations, rules or Orders made under such a power should be subject to negative or affirmative resolution.*

**Question**

- **Do you agree that RROs should be able to provide for sub-delegation provided that proposals are subject to the usual safeguards?**

The majority of respondents agreed that RROs should be able to provide for legislative sub-delegation. The Institute of Directors stated that “the safeguards should be more than enough to ensure that this power is not abused, and it is essential that we take this opportunity to add real teeth to the RRO process.”

Some respondents stated that sub-delegated proposals within RROs would not receive an adequate amount of Parliamentary scrutiny. For instance the Law Commission believed that if an Order proposed to create a power to sub-delegate, “the Minister must provide in some form a statement clearly explaining what powers are being sought, why they are necessary and what the consequences would be if they were not granted. It may also be appropriate for the delegated powers to be subject to a sunset provision if they are not used within a certain period after implementation of the Order. Thorough scrutiny by Parliament through the Order process coupled with these two additional safeguards for delegated powers would, we think, enable the present prohibition on sub-delegation to be removed.”

*Next steps*

The Government has decided to take forward proposals to enable Orders to provide for legislative sub-delegation.

The Bill will specify that the explanatory document laid before Parliament must explicitly identify any powers conferred by the proposed Order to make subordinate legislation, and the procedural requirements attaching to those powers, and must give reasons for the conferral of those powers and for the

choice of procedural requirements. In response to concerns expressed during consultation, the Government has agreed to publish draft regulations alongside Orders as far as possible, and to justify why this not possible or appropriate where that is the case.

The Law Commission suggested that powers to sub-delegate should be subject to sunset provisions - i.e. the powers automatically expire after a certain period. Sunset clauses are appropriate for proposals designed to solve a time-limited problem or where specific requirements might become out of date. However, using a sunset clause for laws that are justified in the long-term is likely to be bureaucratic and inflexible. For this reason, the Government does not propose that all powers to sub-delegate should be subject to sunset provisions, although departments may want to consider this on a case-by-case basis.

## Parliamentary Scrutiny

**The Government would like to hear from you:**

- **What should be the limits to the reforms that could be delivered by this route?**
- **Is it desirable that all RROs should receive the same level of scrutiny, regardless of size or complexity?**
- **Is the super-affirmative procedure necessary for all Orders, or could some be delivered by the faster procedures for ordinary statutory instruments?**
- **If so, could you give examples of the type of proposal that you would like to see delivered by the faster route?**
- **If some proposals were delivered by faster procedures, how would the effectiveness of consultation and the protection of safeguards be maintained? Would it be enough for the explanatory statement laid with Orders to detail (as now) the results of consultation and any changes made as a result of it, and to analyse proposals against the current safeguards?**

### *Limits to reforms*

Regarding the limits to reforms which could be delivered by Order, respondents believed that highly controversial measures would not be suitable for delivery by Order. Some consultees questioned how the definition of 'controversial' would be agreed. The Government envisages continuing the current system, whereby controversiality is decided on a case-by-case basis. The Minister initially takes a view as to whether a proposal is appropriate for delivery by RRO, including whether it is highly controversial. The degree of controversiality will be brought out at the consultation stage. The Parliamentary scrutiny Committees then take a view on whether the Order is inappropriate or controversial, and may reject an Order if they believe it is.

### *Parliamentary procedure for RROs*

Currently all RROs are subject to the super-affirmative procedure – there are two stages of Parliamentary scrutiny by specialist Committees in both Houses. Proposals are scrutinised by the Regulatory Reform Committee (RRC) in the Commons and the Delegated Powers and Regulatory Reform Committee (DPRRC) in the House of Lords.

Most respondents agreed that scrutiny of Orders should be more proportionate. The Co-operative Group commented that "some form of differentiation would seem sensible to focus parliamentary attention where it

was most needed” and the Institute of Directors went further: “given that RROs vary tremendously in terms of their scope, it would seem absurd to require exactly the same type of parliamentary scrutiny for each one”. Professor Miers for Cardiff Law School illustrated the issue with an example of a Deregulation Order which had also been subject to the super-affirmative procedure, which he described in an article in *Public Law*: “The Committee doubted whether, in establishing the ‘carefully balanced and complex’ deregulation procedure, Parliament envisaged its use for a proposal which would result in a per capita saving of 60p per annum to television dealers.”

Some respondents believed that ordinary affirmative or negative procedures for statutory instruments might not provide for adequate Parliamentary scrutiny for proposals amending primary legislation. A number of previous RROs have been very straightforward, such as the Museum of London RRO, which amended a total of eight words in the Museum of London Act 1965 to allow the Museum to exhibit in Greater London, facilitating a merger with the Museum in Docklands. The Government believes that small or simple Orders would benefit from being delivered through more proportionate procedures.

In terms of maintaining the effectiveness of consultation and safeguards if procedures were changed, only the Association of Chartered Certified Accountants had concerns about this. Their objection was based on a general objection to delivering Orders by more proportionate procedures, which most consultees favoured. The Better Regulation Task Force commented that “we fail to see how the effectiveness of consultation or the protection of safeguards would be detrimentally affected if some Orders were delivered by faster procedures. The code of practice for consultation would still need to be followed and all of the safeguards fully addressed. Both issues must be thoroughly examined in the explanatory statement, and there would be no reason to alter this.”

### *Next steps*

In order to reflect the desire for more proportionate procedures whilst responding to concerns that ordinary negative or affirmative procedures might not be appropriate, the Government proposes that the RRC and DPRRC should each have the right to require that the most demanding procedure which either committee considers appropriate must be used. Ministers should be able to recommend what they consider to be the appropriate degree of scrutiny – super-affirmative, affirmative or negative – on a case by case basis. The Government considers that it is right that Parliament should retain the final say on which procedures are appropriate.

As suggested by the RRC,<sup>3</sup> proposals could be put to both Houses to remove the requirement for all Orders to go through two scrutiny stages, so that draft orders which the committees do not ask to be amended can simply be made

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<sup>3</sup> House of Commons Regulatory Reform Committee, *Operation of the Regulatory Reform Act 2001*, First Special Report of Session 2004 – 05, HC 273

at the end of the first scrutiny stage without delay. This would make the system more flexible and encourage departments preparing Orders to produce high quality proposals and documentation, so that they get it right first time.

Consultation responses indicated that it would remain inappropriate to deliver highly controversial measures by Order. In response to consultation, the Government has therefore reiterated its commitment not to use Order powers to deliver highly political measures, such as amendments to terrorism law or the Parliament Act, by Order.

### Reform of private or hybrid legislation

#### **The Government would like to hear from you:**

- **Do you agree that it should be possible to reform private and hybrid legislation by Order as part of a wider reform package?**
- **If so, do you think that any additional safeguards should apply, and if so, which?**

There is an issue as to whether or not Orders should be able to make the kind of provision which would be by private bills (i.e. bills which are sponsored by particular individuals or bodies and which affect the interests of individuals or particular localities) or hybrid bills (i.e. by public bills which affect the private interests of particular persons or bodies of the same category and so attract Parliamentary Standing Orders on private bills). The majority of respondents were in favour of amending private and hybrid legislation by Order.

This leads to the question of whether Orders which make the kind of provision that, if made by a bill, would make the bill hybrid, should be subject to procedural safeguards protecting the interests of the particular persons or bodies who will be affected. Several respondents, including the Advertising Association, made the suggestion that an additional safeguard providing for those “with the potential to be adversely affected by it [the Order] to be heard directly by a suitably constituted Parliamentary committee”. However, the Law Commission proposed that “it might be necessary for the Minister to show Parliament what steps he or she has taken to bring to the attention of those deriving rights or interests from a private or hybrid bill that reform is intended, and the extent to which it is supported by those affected”.

The Scottish Environmental Protection Agency proposed that if the reform of private or hybrid legislation by Order be made possible “additional safeguards should be introduced in the form of petitioning powers accorded to individuals affected”. The British Chamber of Commerce proposed that “the ‘petitioner’ should be entitled to have their case presented in the consultation document (together with the government’s response) and consultees should be specifically asked to consider the issues raised.”

#### *Next steps*

In the light of consultation responses, the Government considers that Orders should be able to amend not only public general Acts but also local Acts (which concern e.g. port and harbour authorities, charities or educational institutions). But the Government does not propose that it should be possible to amend personal Acts (which concern named individuals only, and regulate such matters as family trusts or estates).

The Government considers that in the case of an Order which affects the private interests of any person or body, the Minister must consult them and must outline in the explanatory document who was consulted, what responses have been received, and how if at all the proposals have been modified to take account of those representations.

The Government does not propose to attempt to reproduce the complex and flexible petitioning procedure in rigid statutory language. However there is in the House of Lords a procedure for the consideration of 'hybrid' secondary instruments which applies in the case of affirmative instruments which contain provision which would, if contained in a Bill, require a private or hybrid Bill. In such a case a special petitioning procedure applies, and no motion to approve a hybrid instrument can be made until that procedure has come to an end.

## Chapter 2: Implementing the Hampton report

### Enforcement Concordat

- **Do you agree that the Enforcement Concordat should be updated as described?**
- **Should the Concordat apply to national as well as local regulators?**
- **Should the Concordat be put on a statutory footing?**

There was overwhelming support for updating the Concordat, and for its extension to national as well as local regulators. Opinions were more divided on whether the new Concordat should be statutory or not.

### *Revision*

Support for the revision of the Concordat was broadly-based, with business, regulators and local authorities all expressing their support. There was support both for the revision in principle, and for the Hampton principles in general.

A typical response, from the Advertising Association, was “[We] share the BRE’s view that the Enforcement Concordat requires updating [and] that there is no logic in maintaining an unchanged Enforcement Concordat alongside the Hampton Report principles. Were such an approach adopted there would be two extant sets of guidelines for regulatory behaviour with significant scope for causing confusion amongst regulators and stakeholders alike, given the differences between them. This would serve only to undermine the effectiveness of the Hampton principles being adopted.”

Several respondents reinforced the need for a full consultation on a draft Concordat with all stakeholders. A number also reinforced the importance of risk and risk assessment as the centre of any regulatory regime. Other individual points made included:

- The Concordat would need to be thoroughly revised, not merely to have the Hampton Principles imported;
- The new Concordat would need to be kept up to date as enforcement cultures and situations changed;
- The BRE should consider extending the Concordat to other local authority services, such as planning and building control.

The TUC suggested some additional principles for inclusion in the Concordat, specifically:

- Regulators should have an explicit duty to promote social, environmental and economic progress, and to balance these objectives where they conflict.
- Regulators should, where possible, work on a partnership basis with all the stakeholders with an interest in the outcomes of regulation.
- Regulators should treat these stakeholders equitably. Ideally, they should all be represented in the governance of regulators.
- Regulators should offer information, advice and guidance to all stakeholders

### *Extension to national regulators*

There was overwhelming support for the Concordat's extension to national as well as local regulators, with most respondents making little comment other than to note their approval. Several national regulators remarked that they had already signed up to the voluntary Enforcement Concordat, and saw no potential difficulties with the new Concordat.

### *Statutory footing*

Opinion was divided on whether the new Concordat should be given statutory force. Of those who expressed a view, almost all businesses wanted a statutory Code. Almost all regulators wanted a non-statutory Code.

Of those who wanted a non-statutory Code, most agreed with the Better Regulation Task Force, who said:

“Our view is that statutory intervention should only be considered if it can be shown that the policy objective cannot be achieved by some lighter touch means.”

On the pro-statutory side, the CBI spoke for most when it said:

“The CBI strongly believes that the Concordat should be placed on a statutory basis since current arrangements for voluntary compliance with the Concordat have not been effective.”

### *Next steps*

The Government has decided, in the light of this consultation and other considerations, to proceed with the updating of the Enforcement Concordat as outlined in the consultation document. Its view is that the new Concordat will apply to all regulators that were covered by the Hampton Report, but the detail of this will be considered further as the new Concordat develops.

The Local Authority Better Regulation Group will publish a draft of the new Concordat for consultation later in the year.

The Government has decided that it should, for the sake of future flexibility, retain the power to make the Concordat statutory, as envisaged in the consultation document. In the light of the divided views expressed during the consultation, however, it has not yet decided whether to make the new Concordat statutory, or whether to trial the Concordat as a voluntary agreement.

### Mergers

- **Should the Government take a power, as described above, to update regulatory structures?**
- **Are the safeguards proposed adequate to ensure the powers are used appropriately?**
- **Should these enabling powers be limited to completion of the Hampton review recommendations or wider so as to include mergers not identified by the Hampton review?**

Respondents showed less interest in issues around regulatory structure. A majority favoured the Government's proposal for a power to reform regulatory structures, with a few respondents opposed and others neutral. Of those who responded, there was strong support for the safeguards proposed, but over half of respondents did not express a view. Again, there was strong support for keeping the power general, but with many silent responses.

Support, where it was expressed, was broadly based. There was no significant discrepancy between business and regulators in their responses. Few respondents made detailed comments, although a few reiterated the need for detailed consultation on proposed mergers, and for care to be taken that specialist expertise was not lost.

### *Next steps*

The Government is proceeding with the mergers identified in the Hampton Report, and will meet the report's deadline of April 2009 for the completion of all mergers.

After discussion with the implementing Departments, the Government has decided that a specific enabling power in this Bill is not now required. With the changes to Orders detailed above, Orders will be able to deliver the changes to regulatory structures for which the specific power was originally envisaged.

## Penalties

- **Should the Government take a power in this bill to deliver penalty regime reform?**
- **Should such a power be limited to reforms coming out of the Better Regulation Executive's penalty review?**

The questions on the penalty regime also generated less interest than the proposals to change the Enforcement Concordat. A majority of those responding were in favour of the proposal, a few disagreed and over half of respondents expressed no view. Most respondents did not respond to the question on limiting the power to the BRE Penalties Review.

It is difficult to draw exact conclusions from the consultation responses on this issue. Those who responded positively tended to express general support for reform, rather than specific support for the power. Those who disagreed tended to disagree with the specific power, but express support for reform in the future.

### *Next steps*

The BRE's Penalties Review is now underway, led by Prof. Richard Macrory of University College, London. It will be issuing a call for evidence in December 2005, an interim report in March next year and a final report in Autumn 2006.

On the basis of this consultation, and other considerations, the Government has decided not to pursue a penalty reform power until after the outcome of the Macrory Review in Autumn 2006.

## **Conclusions: Implementing the regulatory reform agenda**

The consultation process played an important role in informing the Government's proposals for regulatory reform. Respondents expressed broad based support for the recommendations outlined in the consultation document, *A Bill for Better Regulation*. Respondents views also informed Government policy on issues such as the nature of RRO powers, levels of parliamentary scrutiny and for RROs reforming private or hybrid legislation by Order, and on implementation of the Hampton recommendations.

In light of the results of the consultation process, the Government has decided to move forward with the majority of proposals outlined in the consultation document, *A Bill for Better Regulation*. Government expects to bring the Regulatory Reform Bill before parliament in the new year.

## Annex A

### List of consultation respondents

Advertising Association
Association of Building Engineers
Association of Chartered Certified Accountants
Association of Labour Providers
Audit Commission
Better Regulation Task Force
Bio Industry Association
British Airways
British Chambers of Commerce
British Medical Association
British Retail Consortium
British Vehicle Rental and Leasing Association
Charity Commission
Chartered Institute of Environmental Health
Chemical Industries Association
Civil Aviation Authority
Clive Howard-Luck
Commercial Radio Companies Association
Confederation of British Industry
Construction Industry Council
Corp of London
Council of Mortgage Lenders
Country Land & Business Association
E. Midlands Co-ordinators of Trading Standards
EEF
Environment Agency
Federation of Small Business
Food & Drink Federation
Forum for Private Business
Gateley Wareing LLP
General Medical Council
Gibbons Mannington

Health and Safety Commission
ICAEW
Institute Chartered Accountants Scotland
Institute of Directors
Institute of plumbing and heating engineering
JNCC RRO team (Defra)
Law Commission
Law Society
Law Society of Scotland
LGA-LACORS (local govt)
Mark Hodge
National Farmers Union
National Housing Federation
National Joint Utility Group
National Pig Association
Nick Montague
Office National Statistics
Office of Fair Trading
Office of Immigration Services Commissioner
OFGEM
Packaging Federation
Prof David Miers Cardiff Law School
Professional Contractors Group
REC
Royal Institute of British Architects
Scot. Environ. Protection Agency
Scotch Whisky Association
Small Business Council
Social Market Foundation
Society Chief Officers of Trading Standards Scotland
Society of Motor Manufacturers and Traders Ltd
SOLAM (trading standards)
South East Water
Southampton & Fareham Chamber of Commerce
SWERCOTS (trading standards)
TGWU

The Co-operative Group
Trade Union Congress
Trading Standards Institute
Wales Council for Voluntary Action
Water UK
Western Power Distribution



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