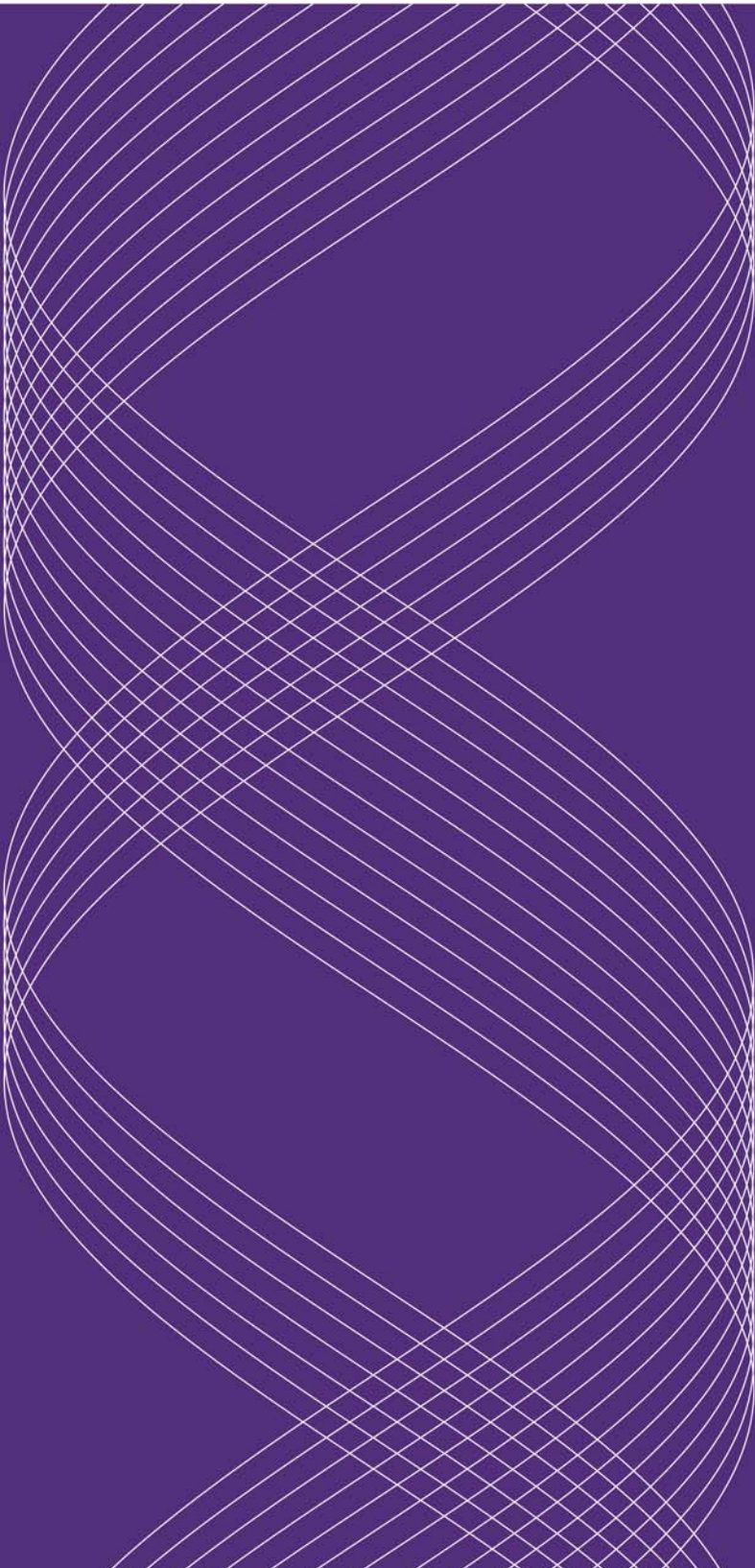




# Legislative and Regulatory Reform Bill Final Regulatory Impact Assessment





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## Introduction

- 1 The purpose of this document is to assist consideration of provisions in the Legislative and Regulatory Reform Bill (“the Bill”).

## Purpose and Effect of Intended Measures

- 2 The current regulatory reform order (‘RRO’) power under the Regulatory Reform Act 2001 (‘2001 Act’) is limited and unnecessarily complex. These problems have contributed to the disappointing number and rate of reforms that have been delivered under the Act.
- 3 Departments are developing rolling programmes of simplification, which will include proposals to reduce administrative burdens, and wider simplification measures to reform and deregulate existing regulation. The simplification plans will all be published by the autumn of 2006, and the Department for Trade and Industry (DTI), the Department for Environment, Food and Rural Affairs (DEFRA), and the Health and Safety Executive (HSE) have already published draft plans. The Bill is designed to facilitate the swift and effective delivery of these measures from simplification plans which require amendment to primary legislation.
- 4 In their draft initial simplification plan *Lifting the burden*<sup>1</sup>, published on 29<sup>th</sup> November, DEFRA sets out simplification proposals across their policy areas. For example, working with the Environment Agency DEFRA has proposed to simplify the existing exemption orders under the Radioactive Substances legislation. The DTI has published its *Better Regulation Draft Simplification Plan*<sup>2</sup>, which contains proposals from across their policy areas, including proposals in relation to employment law, construction legislation, weights and measures, and consumer and energy law. The plans contain a proposed RRO, put forward by the Environment Agency, which could simplify the existing exemption orders under the Radioactive Substances Act. This could save £1m/yr for industry and about £0.25m/yr for the EA/DEFRA<sup>3</sup>. The DTI’s plans could deliver savings of over £1 billion by the year 2010.<sup>4</sup> These figures indicate that, if even a small proportion of these measures were achievable by powers in the new Act, then savings attributable to it would be substantial.

### *Objective*

- 5 The purpose of the measures contained in the Bill, and analysed in this Regulatory Impact Assessment (RIA), is to make it simpler and

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<sup>1</sup> Lifting the burden: DEFRA Initial Regulatory Simplification Plan, DEFRA, November 2005

<sup>2</sup> Better Regulation Draft Simplification Plan, DTI, November 2005

<sup>3</sup> Lifting the burden: DEFRA Initial Regulatory Simplification Plan, DEFRA, November 2005

<sup>4</sup> DTI Draft Simplification Plan, DTI, November 2005

faster to amend, repeal or replace outdated, unnecessary or over-complicated legislation by order, with the policy aim of creating a better regulatory environment and to implement Law Commission recommendations, including those that reform the common law. The measures will allow necessary mergers to be carried out, and in particular enable mergers recommended in the report "*Reducing administrative burdens: effective inspection and enforcement*" ("*the Hampton Report*"). It will also provide the possibility of putting general regulatory principles onto a statutory footing and of issuing a statutory Code of Practice and of simplifying the implementation into domestic legislation of European legal obligations using powers in the Bill.

## Background

- 6 The Government's Better Regulation agenda includes the implementation of proposals outlined in two reports. The Better Regulation Task Force report *Less is More: Reducing Burdens, Improving Outcomes*<sup>5</sup> contained recommendations for administrative burden reduction and rolling simplification programmes across Whitehall. Philip Hampton's report *Reducing administrative burdens: effective inspection and enforcement*<sup>6</sup> ('the Hampton report') contains principles for open and proportionate enforcement by regulators. The implementation of these reports will require legislative and regulatory reform.
- 7 At the moment, the Government has a power under the 2001 Act to make orders which reform primary and secondary legislation to remove regulatory burdens, subject to certain constraints.
- 8 During the passage of the 2001 Act the Government gave an undertaking to review the Act in 2004. When that deadline approached, the Act had not been used as extensively as had been envisaged, so it was agreed with the relevant Committees in Parliament that the review would be delayed until further use had been made of the Act. The full review has now taken place and is available at [www.cabinet-office.gov.uk/regulation/index.asp](http://www.cabinet-office.gov.uk/regulation/index.asp)
- 9 The Government consulted on proposals emanating from the review of the 2001 Act and the Hampton report in *A Bill for Better Regulation: Consultation Document*<sup>7</sup>. The consultation ran from 21 July 2005 to 12 October 2005. A summary of responses to the

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<sup>5</sup> *Regulation – Less is More: Reducing Burdens, Improving Outcomes*, Better Regulation Task Force, March 2005

<sup>6</sup> *Reducing administrative burdens: effective inspection and enforcement*, HM Treasury, March 2005

<sup>7</sup> *A Bill for Better Regulation: Consultation Document*, Cabinet Office, July 2005

consultation, *A Bill for Better Regulation: Summary of Consultation Responses*<sup>8</sup>, was published on 14 December 2005.

## **Rationale for Government Intervention**

- 10 When the 2001 Act was passed, departments identified 63 proposals that appeared suitable for delivery by RRO. These were shown in the *Regulatory Reform Action Plan*<sup>9</sup>, published in February 2002.
- 11 Many of these are no longer being taken forward due to the RRO route being unsuitable or other legislative vehicles being identified as a more appropriate method of delivery. To date, only 27 RROs have been delivered.
- 12 It had been hoped that the 2001 Act would provide an effective means of enacting Law Commission recommendations, thereby reducing the backlog of recommendations that have been accepted by Government but remained unimplemented due to the unavailability of Parliamentary time.

### *Burdens*

- 13 At present, every RRO must remove or reduce a burden. The 2001 Act allows RROs to impose burdens, as long as an existing burden is removed or reduced within the same order. The 2001 Act defines burdens as a statutory restriction, requirement or condition, any sanction for failure to observe a restriction or comply with a requirement or condition, or any limit on the statutory powers of a person. The ordinary meaning of 'burden', which could include the administrative inconvenience or expense associated with a statutory restriction, requirement, condition or limit, or other regulatory impact, is not classed as a burden for the purposes of the Act.
- 14 The 2001 Act precludes reforms which only remove or reduce burdens from Ministers or government departments. Such burdens can be removed if their removal also benefits others, such as the general public or businesses. However, in practice, it has not always been possible to link the benefit to others directly with the removal of a burden in legislation. For example, the creation of the Health Protection Agency removed a burden from Ministers and was a valuable reform which benefited others, but the link to the removal of the burden was not sufficiently established to enable the reform to be delivered by RRO.

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<sup>8</sup> *A Bill for Better Regulation: Summary of Consultation Responses*, Cabinet Office, December 2005

<sup>9</sup> *Regulatory Reform: The Government's Action Plan*, Cabinet Office, February 2002

- 15 The need to satisfy the statutory definition of ‘burden’ requires detailed analysis from departments, and it is not always possible to bring proposals for change within the framework of burdens required by the 2001 Act. Worthwhile proposals have not proceeded because they did not clear this hurdle, preventing some important reforms from being made, or limiting the benefits of other reforms which have been made.

#### *Two-year rule*

- 16 RROs cannot amend legislation less than two years old or legislative provisions which have been substantively amended in the previous two years. This rule was incorporated into the 2001 Act to discourage over-frequent amendments to Acts. However, it has had a detrimental effect on a number of proposals, including two recent proposals (the Gaming Machines RRO and the NHS Charities RRO) which have undergone scrutiny and which could not be delivered fully by RRO due to the rule.
- 17 Where a department is in the process of legislating and it is known that there may be a problem with the two-year rule, it is sometimes possible to exclude the rule’s operation by inserting a suitable provision in a Bill. This has happened on five occasions.
- 18 Overall, the Review found that the effect that the rule has had in hindering worthwhile proposals has been disproportionate to its intended benefit of preventing repeated amendments to the same legislation.
- 19 The two-year rule has caused many RRO proposals to be dropped or amended before being laid for scrutiny. An example is the Regulatory Reform (Gaming Machines) Order 2003: part of the proposals had to be dropped because of recent prior amendment of the relevant provisions. Other examples are listed in the *Review of the Regulatory Reform Act 2001*<sup>10</sup>. The two-year rule has not shown itself to be a proportionate way of discouraging departments from amending legislation over-frequently.

#### *Inability to sub-delegate power to make legislation*

- 20 The 2001 Act contains no power of legislative sub-delegation – that is, an RRO cannot confer a power to make secondary legislation. The 2001 Act currently allows for a partial solution to this problem, as an RRO can include subordinate provisions (whereby certain provisions of an RRO can be specially designated as subordinate provisions which can be subsequently changed by normal statutory instrument procedures). However, this approach is designed only for

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<sup>10</sup> *Review of the Regulatory Reform Act 2001*, Cabinet Office, July 2005

minor or detailed provisions. In addition, it requires departments to decide at the outset on the scope and content of the detailed rules that they will need, and this is not always achievable or desirable in the case of major legislative reform.

- 21 It is an obstacle to regulatory reform for RROs not to be able to confer or modify powers to make secondary legislation.

*Reference to activity*

- 22 Section 1(1) of the 2001 Act sets out the main order-making power and the context within which it can be exercised. This section states:

*'...a Minister of the Crown may by order make provision for the purpose of reforming legislation which has the effect of imposing burdens affecting persons in the carrying on of any activity...'*

- 23 The requirement of the carrying on of an activity has frustrated a number of proposals to reform the law where a person is subject to a burden in a passive capacity, perhaps because the burden affects him merely as a recipient or because the burden affects a one-off action. Where a person is not carrying on an activity, proposals to remove a burden cannot currently be delivered by RRO.

*Disproportionate scrutiny procedure*

- 24 At present, section 8(2) of the 2001 Act requires that all RROs receive the same level of initial scrutiny – that is, the super-affirmative procedure: an order in the form of a draft is subject to an initial scrutiny period of 60 days before a draft order can be laid under the affirmative procedure. At this point there is a final stage scrutiny period of 15 days: this is not specified in the Act, but is governed by parliamentary Standing Orders. This is the same no matter what size the proposed reforms, and RROs can vary considerably in size and complexity. For example, the Museum of London RRO makes a two-line amendment to the Museum of London Act 1964. This can be contrasted with the Fire Safety RRO, which is a 64-page Order amending or repealing over 50 pieces of legislation. Other small and relatively straightforward proposals include the Regulatory Reform (Special Occasions Licensing) Order 2002, the Regulatory Reform (Sunday Trading) Order 2004, and the Regulatory Reform (Assured Periodic Tenancies) (Rent Increases) Order 2003. Officials working on small RROs often felt the process took far too long for the outcomes achieved.

- 25 The Delegated Powers and Regulatory Reform Committee (DPRRC) has commented that the onerous nature of the RRO process means that it is more suited to larger reforms:

*“Although we welcome the Government’s commitment to greater use of the regulatory reform mechanism, our greater concern is that it should be applied to policy changes of some significance. The regulatory reform process is an onerous one and the importance of measures should, we believe, be proportionate to the effort and resources expended in satisfying its requirements.”<sup>11</sup>*

- 26 Although the Government agrees that the current procedure is onerous, it does not wish to lose the benefit of delivering worthwhile, albeit smaller-scale reforms, by this route as well. The administrative burdens measurement exercise and the Dutch experience of administrative burdens cited in The Better Regulation Task Force report *Less is More: Reducing Burdens, Improving Outcomes*<sup>12</sup> demonstrates that individual administrative burdens may be small but cumulatively significant and there is a need for a power to remove small-scale or individual burdens as swiftly and effectively as possible.
- 27 The Government considers that there is a clear difference between proposals such as the Commissioner for Wales RRO which removed one burden, and the Fire Safety RRO which simplified the entire fire safety regime for non-domestic properties. Some RROs are so small that they attract little public attention, such as the Museum of London RRO mentioned above, which only elicited four consultation responses. The Government sees no reason in principle why departments could not consider what level of scrutiny might be appropriate whilst developing proposals. Some other Henry VIII powers use affirmative or negative procedure, and there would be benefit to having the flexibility to use these procedures for smaller proposals.

*Inability to reform common law*

- 28 The 2001 Act cannot currently be used to reform common law (with the power only available to reform legislation). For this reason, several recommendations have previously not been able to proceed via RRO. This is particularly relevant to Law Commission recommendations. It is under a statutory duty to keep the whole of the law of England and Wales under review with a view to its systematic development and reform. The Commission’s proposals, therefore, often involve legislating for matters covered by the common law. The omission of a power to legislate in these areas greatly reduced the benefit of the 2001 Act power.

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<sup>11</sup> *1st Report of Session 2003 – 04. Special Report Sessions 2001-02 and 2002-03: The Work of the Committee*, House of Lords Delegated Powers and Regulatory Reform Committee, December 2003

<sup>12</sup> *Regulation – Less is More: Reducing Burdens, Improving Outcomes*, Better Regulation Task Force, March 2005

- 29 The Law Commission considered in some depth its unimplemented Reports to see whether any might be suitable for implementation by RRO under the 2001 Act. The conclusion was that, based on restrictions contained in the Act, very few were. To date only two Law Commission Reports have been taken forward by RRO. They are 'The Execution of Deeds and Documents by Bodies Corporate' (1998) and the 'Landlord and Tenant Business Tenancies: A periodic review of the Landlord and Tenant Act 1954' (1992). Examples of Law Commission recommendations that were considered and consulted on for implementation as RROs, but subsequently abandoned because of this limitation are those relating to the rights of third parties against insurers (2001) and the rule against excessive accumulations (1998). Other Law Commission recommendations, such as those relating to the reform of the rule against perpetuities (1998), quite clearly related to the common law as well as legislation and could not proceed by way of RRO.

#### *Principles and Code of Practice proposals*

- 30 The Hampton Report made recommendations about how regulators should act in a proportionate and risk-based way. The Legislative and Regulatory Reform Bill contains provisions to assist in the implementation of the Report's recommendations. The Bill defines regulatory functions that may be specified by an order made by the Minister. There is a statutory duty on those exercising specified regulatory functions to have regard to general regulatory principles set out on the face of the Bill (based on the Better Regulation Task Commission's principles of better regulation) and to a Code of Practice which the Bill enables a Minister to make. In the 2001 Act there is already a power to make codes of practice and the provision in this Bill retains that power with relevant amendments.

## **Consultation**

- 31 As part of the *Review of the Regulatory Reform Act 2001*, BRE officials conducted review sessions with Whitehall teams and departmental lawyers that have delivered RROs to gauge their experiences. Informal discussions with officials at the Parliamentary Committees were also conducted. Potential reforms that could not be delivered by RRO were also considered. Conclusions on the disappointing rate and scale of reforms achievable under the current Act, particularly in light of the Government's commitment to delivering simplification and administrative burden reductions as recommended by the Better Regulation Task Force report *Less is More: Reducing*

*Burdens, Improving Outcomes*<sup>13</sup>, led to formal consultation on proposals for change.

- 32 A formal written public consultation on the proposals, *A Bill for Better Regulation: Consultation Document*<sup>14</sup>, ran from 21 July 2005 to 12 October 2005. A summary of responses to the consultation, *A Bill for Better Regulation: Summary of Consultation Responses*<sup>15</sup>, was published on 14 December 2005. 77 responses were received, which overall were extremely positive. Strong support was expressed for the Regulatory Reform proposals. The consultation document also included some proposals relating to the implementation of the Hampton report. The majority of respondents welcomed proposals to update the Enforcement Concordat. The Government has decided that the Bill should, for the sake of future flexibility, retain the power to make the Enforcement Concordat (now to be known as the Compliance Code) statutory, as envisaged in the consultation document. However, in the light of the divided views expressed during the consultation, it has not yet decided whether to make the new Concordat statutory, or whether to trial the Concordat as a voluntary agreement. A separate consultation on the draft Compliance Code will be published shortly.
- 33 There was support, though from fewer respondents, for proposals to amend merger and penalty powers. The general law reform power being taken in the Bill will enable some of the mergers recommended by the Hampton Report to be delivered and enables some reform to penalty regimes. Other reforms to penalties are to be delivered separately.
- 34 The Hampton Report recommended that the Government undertake a comprehensive review of penalty regimes. The BRE has appointed Professor Richard Macrory to head this review which is well underway, with the review's discussion paper, *Regulatory Justice: Sanctioning in a post-Hampton World* published on 7th December.<sup>16</sup>

## Options

- 35 The following section explores the options for reform that have been considered, the rationale of each and reasons for the choice that has been made.

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<sup>13</sup> *Regulation – Less is More: Reducing Burdens, Improving Outcomes*, Better Regulation Task Force, March 2005

<sup>14</sup> *A Bill for Better Regulation: Consultation Document*, Cabinet Office, July 2005

<sup>15</sup> *A Bill for Better Regulation: Summary of Consultation Responses*, Cabinet Office, December 2005

<sup>16</sup> *Regulatory Justice: Sanctioning in a post-Hampton World*, Cabinet Office, December 2005

## **Option 1**

### **Do nothing**

RROs could continue to remove burdens but the 2001 Act would limit this to burdens as defined in the Act<sup>17</sup>, which do not only affect a government Minister or department. Limited use of the 2001 Act power would continue, but it would not be possible to deliver wider legislative reforms, including simplification and modernisation, or remove burdens from public sector organisations.

Under this option, the Government could still introduce a statutory Code of Practice for regulators (under the power in Section 9 of the 2001 Act).

Given the need to provide a more flexible vehicle to allow efficient delivery of reforms identified in departments' simplification plans, and the positive responses to consultation on proposals to amend the 2001 Act (see above), this option is not recommended.

## **Option 2**

### **Make purely administrative changes to the procedures**

There was exploration with departmental officials as to whether there could be procedural changes to ease the paperwork burden on them. The following changes were proposed:

- *Presentations* – the Regulatory Reform Committee has confirmed that there is no mandatory requirement for departments to give a presentation to them about their RRO proposals, so presentations are not compulsory for minor proposals.
- *Consultation documents* – some departments have told us that the size of the consultation document they are required to produce can be disproportionate to the size of their proposals and that consultees may be deterred from commenting on such a lengthy document. There will be streamlining and restructuring of the template to ensure that future consultation documents are less bulky and easier to read.
- *Paper copies of documents* – when laying a proposal for scrutiny, departments have to copy a large number of documents, which are

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<sup>17</sup> A restriction, requirement or condition, any sanction for failure to observe a restriction or comply with a requirement or condition or any limit on the statutory powers of a person.

sent to the Committees as well as the Votes Office in the Commons and the Printed Papers Office in the Lords. Copying and sending these documents can be time consuming and laborious. The Lords office has agreed to reduce their requirements considerably, lessening the burden on departments.

Given the support expressed for proposals to amend the 2001 Act during the consultation process, these administrative changes will not be carried out in isolation: they will be taken forward alongside legislative amendment, detailed in option 4, below, which reflects changes following consultation.

The beneficial effect of these changes, such as streamlining the consultation document paperwork, will be complemented by the new approach to reform under the proposed powers detailed in option 4. These powers will focus on the overall merits and impacts of reforms rather than complex technical analysis of how changes are to be made.

### **Option 3**

#### **Reform the 2001 Act to:**

- **widen the scope** of the power to reform the law whilst making sure there are more comprehensive safeguards, to allow a greater number of reforms to be delivered by orders;
- **update the Enforcement Concordat**, which will be revised around the Hampton principles of inspection and enforcement;
- **provide a power to undertake structural changes to regulators; and**
- **provide a power to change regulatory penalty regimes.**

#### **Proposed changes to the 2001 Act**

##### ***Order-making power***

It was proposed that the 2001 Act powers should be redesigned to make it more outcome-focused, and for the emphasis not to be on the individual burdens reduced or amended, but rather on the overall benefits that the reforms deliver. This was to be achieved by making the power sufficiently wide to include explicit provision for the simplification of legislation and the delivery of proposals deriving from Law Commission reports (including reform of the common law). This would be balanced with comprehensive use of safeguards. There was overwhelming support from consultees for extending RRO powers to allow the implementation of simplification measures and uncontroversial Law Commission reports. However, a number of respondents expressed concern over the potential complexity

of the new powers suggested in the consultation document.

Ways of making procedures more proportionate were explored. Consultees were asked for views on whether all orders should receive the same level of scrutiny, regardless of complexity. Most respondents agreed that procedures should be more proportionate. However, some respondents were concerned that ordinary negative or affirmative procedures for statutory instruments might not ensure adequate Parliamentary scrutiny for proposals amending primary legislation. In response to these concerns, the Government proposes to give the Parliamentary scrutiny committees the power to decide what level of scrutiny each order should receive. The Government's proposals are outlined in option 4 below.

## Detailed proposals

### *Powers*

It was proposed that the new orders should be able to amend or repeal primary legislation in order to do **one or more** of the following three things ('the three strand approach'):

- remove, reduce, re-enact or impose burdens (as now);
- implement uncontroversial Law Commission recommendations, including those that amend common law; and/or
- simplify legislation, including, for example:
  - ◆ clarification of legislation, i.e. resolving doubts and ambiguities about its meaning;
  - ◆ restating the law, with a view to improving transparency, coherence or accessibility;
  - ◆ correction of minor errors and omissions, e.g. failure to make necessary consequential provision;
  - ◆ consolidation of legislation (i.e. bringing together disparate pieces of legislation, to make the whole more accessible and transparent); and
  - ◆ removal of unnecessary or obsolete provisions.

Almost all respondents agreed that orders should be able to simplify legislation in the ways outlined in the consultation document. They strongly agreed that simplification should include changes to the substance of legislation, as well as clarifying, consolidating or restating legislation without changing its meaning.

This would increase the range of reforms possible by orders. But a number of consultees noted that a RRO power to specifically achieve these three aims might be difficult to use. Instead, a general reform power would replace the existing burdens power (and the power to remove

inconsistencies and anomalies) and subsume the other two strands considered in the consultation document: it would be capable of doing anything which they could do. Formulated in general terms, it should be more coherent and simpler to understand and apply than the three-strand option. In light of this, we are recommending the revised proposal, detailed in option 4, which should counteract these concerns and provide sufficient breadth and flexibility of powers to deliver necessary reforms efficiently.

*Lack of a power to sub-delegate (legislative sub-delegation)*

We proposed to remove this limitation from the Act, and the majority of consultation respondents agreed that orders should be able to provide for legislative sub-delegation. In light of these responses, we intend to include this proposal in option 4 which emerged from consultation findings detailed below.

***Safeguards/conditions***

Under the 2001 Act, RROs must maintain any necessary protection and protect rights and freedoms. Where new burdens are imposed, they must be proportionate to the benefit expected to result; the order as a whole must strike a fair balance between the public interest and the interests of the persons affected by the burden being created; and generally it must be desirable for the order to be made.

It was acknowledged that these safeguards have worked well. We proposed to keep the safeguards relating to necessary protection and rights and freedoms, and to extend the 'new burdens' safeguards (with some adaptation), so that they apply to all types of provision made by orders: this extension was considered to be a significant strengthening of the safeguards. It was also expected to have the advantage of broadening analysis from a burdens-driven focus to the wider impacts and benefits of overall proposals and outcomes.

The vast majority of consultation respondents agreed that the existing safeguards should be maintained and applied comprehensively to all orders. The Government therefore proposes that this should be carried forward to option 4.

During Parliamentary debate on the 2001 Act, Ministers made the commitment not to use the procedure for large or controversial measures. They also recognised that orders should only be used for subjects that were 'appropriate'. In practice, these undertakings have acted as further safeguards on the use of the order-making power and views were sought in the consultation document as to the types of proposals which are appropriate to be delivered by RRO. Respondents believed that highly controversial measures would not be suitable for this type of legislation.

## ***Technical limitations***

### *Two-year rule*

It was proposed that this rule should be removed from the Act, and respondents strongly agreed. In light of responses to the consultation, this proposal will be included in option 4, which emerged from consultation findings detailed below.

### *Burdens on Ministers or government departments*

It was proposed that the block on reforms that only remove or reduce burdens on Ministers or government departments should be removed. There was strong support for this proposal from respondents to the consultation. In light of the responses to consultation, this proposal will be pursued as part of option 4 emerging from consultation findings, detailed below.

### *Reference to activity*

Section 1(1) of the 2001 Act sets out the main order-making power and the context within which it can be exercised. This section states:

*‘...a Minister of the Crown may by order make provision for the purpose of reforming legislation which has the effect of imposing burdens affecting persons in the carrying on of any activity...’*

It was proposed that the reference to carrying on an activity should be removed. No respondents specifically objected to removing the reference to activity. On this basis, we intend to include this proposal in option 4, which emerged from consultation findings, detailed below.

### ***Proportionate scrutiny***

We considered introducing a more proportionate level of scrutiny, related to the size and complexity of the proposal, and asked consultees for their views on this. Most respondents agreed that procedures should be more proportionate. However, some respondents were concerned that ordinary affirmative or negative procedures for statutory instruments might not provide for adequate Parliamentary scrutiny for proposals amending primary legislation. In response to these concerns, option 4, set out below, includes details of a proposal to allow more proportionate scrutiny whilst ensuring that parliament retains the ability to impose a more onerous procedure where necessary.

### ***Reforming common law***

We proposed that orders which are implementing Law Commission recommendations should be able to reform the common law, but that this

should not apply to orders which remove or reduce burdens or simplify legislation. The majority of respondents (including the Law Society and the Law Commission) took the view that changes to the common law recommended by the Law Commission should be possible by this route but a minority raised concerns about the appropriateness of using orders for this purpose.

In light of the responses received, we intend to include this proposal in option 4, below. The Government will only recommend proposals for delivery by order if it considers them appropriate for implementation by way of an order, and the Committees would continue to consider whether or not orders are appropriate and may reject them on that basis. The appropriateness of Law Commission proposals, including those reforming common law, will therefore be judged on a case-by-case basis, in the same way as other proposals.

### ***Mergers and penalties***

It was also proposed that the Bill contain specific powers to enable the reform of regulatory structures (to permit some of the mergers recommended in the Hampton Report), and to enable the reform of regulatory penalty regimes.

The changes to the RRO power (discussed above) will allow some of the mergers recommended in the Hampton Report to be carried out through orders made under Part 1 of the Bill, alongside other measures if required. For this reason, there is no separate power in the Bill.

The penalties power, which was suggested as an option in the consultation document, would have been designed to implement the recommendations of the Better Regulation Executive penalties review, which began in September 2005, and is due to make its final report in autumn 2006. The Government has decided to wait for the outcome of this review before deciding what, if any, legislative powers are necessary in addition to those already provided for through the Bill's general law reform power.

## **Option Four - emerging after consideration of consultation responses**

In light of the consultation responses, particularly those expressing concern at the complexity of the proposed three-strand approach, we are now proposing option 4 as a revision of option 3. This simplifies the power, and will enable the delivery of mergers (within the constraints set down for orders in general).

### **Order making proposals**

#### ***Powers***

There should be a general power to make orders:

- reforming legislation, or
- implementing Law Commission recommendations, including those reforming the common law.

An order may confer a power on a person to make subordinate legislation.

This revised option does not include separate powers to reform regulatory structures or penalty regimes for the reasons given above.

#### ***Safeguards/conditions***

An order may only be made if the responsible Minister is of the opinion that the order:

- is desirable, because of the comparative inadequacy of non-legislative solutions to the problem which the order is intended to solve or mitigate
- will produce effects which are in due proportion to its aim;
- strikes a fair balance between the public interest and the interests of any person adversely affected by it;
- does not remove any necessary protection;
- does not prevent anyone from continuing to exercise any rights or freedoms which they might reasonably expect to continue to exercise.

#### ***Substantive restrictions***

##### *Taxation, criminal penalties, search and forcible entry*

An order cannot:

- impose or increase taxation
- create new criminal penalties above a specified limit, nor increase criminal penalties beyond that limit (this does not

apply to orders implementing Law Commission recommendations)

- create new powers for forcible entry, search, or seizure; or compelling the giving of evidence (this does not apply to orders implementing Law Commission recommendations).

### ***Proportionate Scrutiny***

The Minister may recommend a draft order undergo a negative, affirmative or super-affirmative procedure.

Parliament can require a higher level of scrutiny than that proposed by the Minister, and the draft order will proceed according to the highest level of scrutiny required.

A Minister who proposes to make an order must consult on the proposals unless reliance can be placed on a prior Law Commission consultation where no material changes are made to the Law Commission recommendations.

### **Principles and Code of Practice proposals**

The Bill contains the following:

- a provision codifying general regulatory principles
- a power to make a Code of Practice
- a power to specify by order the regulatory functions covered by the Principles and the Code

### ***Definition of regulatory functions***

The order specifying which regulatory functions are covered by the regulatory principles and Code of Practice can only specify functions within the definition of regulatory function. The Bill defines regulatory function as a function under any enactment imposing requirements, restrictions or conditions in relation to any activity, or a function that relates to the securing of compliance with, or the enforcement of, requirements, restrictions or conditions imposed in relation to any activity under any enactment.

### ***Exclusions***

The order specifying regulatory functions cannot include:

- devolved functions (though it can include reserved functions exercised in Scotland and Northern Ireland)
- functions exercised by certain economic regulators listed in the Bill

## **Regulatory Reform and Europe**

Additional measures concerning the implementation into domestic legislation of European legal obligations are now included in the Legislative and Regulatory Reform Bill. The measures bring some better regulation benefits, such as reducing legislative complexity, and are as follows:

### ***References to EEA States***

This provision inserts a definition of “EEA State” into the Interpretation Act 1978 and says that at any particular time it means a state which is a member state of the European Community, or a party to the EEA agreement.

- This will avoid the need for new legislative instruments to amend all references to “EEA States” each time the class of EEA States is expanded by the addition of a new EEA State.

### ***References to amended Community Instruments***

This provision (which is also an addition to the Interpretation Act 1978) means that when a draft new piece of legislation which refers to a Community Instrument which at that time has already been amended, the reference in the new legislation is to the Community Instrument as amended.

- This removes the need for the new legislation to specify all the changes which have already been made to the Community Instrument being referred to. This will allow domestic legislation to be simpler.

### ***Power to make instruments other than regulations under section 2(2) of the European Communities Act 1972 (‘the ECA’)***

This amendment to section 2(2) ECA will provide that, when implementing European obligations under the power in that section, not only regulations but also other forms of secondary legislation (namely orders, rules and schemes) can be made.

- This will make the power in section 2(2) to make secondary legislation more flexible since it provides a choice as to the most appropriate form of legislation.

### ***Ambulatory References to Community Instruments***

This provision will provide a power so that, where making secondary legislation under section 2(2) ECA, that secondary legislation can specify that any reference in it to a community instrument is to be read as a reference to that instrument as amended at any later date. This will remove the need for the secondary legislation to be amended every time that a community instrument to which it refers is itself amended. This will reduce the number of statutory instruments which have to be made to update regulations etc made under section 2(2) ECA.

- This will make domestic legislation easier to understand and easier to keep track of.

## Benefits

- 38 The Bill sets out enabling powers, with no major costs or benefits directly attributable to it. It is therefore not possible to provide detailed, finite quantification of the likely benefits of any of the options as any benefits arising from its ongoing use relate to benefits flowing from orders made under its powers. Orders made under the power in this Bill must be accompanied by an analysis of any costs, benefits and any other economic or social impacts expected to result from them.
- 39 It is the Government's intention to use these powers to deliver simplification and administrative burden reductions measures arising from Departmental simplification plans where these require reforming primary legislation. In looking to quantify the anticipated benefits, using the experience of the Dutch is a means to assess the benefits has proved useful.
- 40 The Dutch use the Standard Cost Model to measure their administrative burden on business (further information on this is contained in the Better Regulation Task Force report *Less is More: Reducing Burdens, Improving Outcomes*<sup>18</sup>) and have set a target of cutting 25% from this burden over four years, which will result in direct savings to business. The Dutch time profile shows delivery of maximum benefit in the fourth year as many simplification proposals need primary legislation.
- 41 Moreover, Dutch economic forecasts predict GDP will rise by 1.5% over the medium term (15 years) as a result of the cut in administrative burden. GDP will rise because the time and money businesses save on paperwork will be used for more productive activity such as sales, production and innovation, which will increase their output.
- 42 Applying a similar methodology, the Better Regulation Task Force estimated that reform the regulatory environment could boost British national income in the long term by 1% of GDP – a gain of around £10bn for the UK economy.
- 43 A specific example in the UK context is set out in DEFRA's draft Simplification Plan<sup>19</sup>. In that plan, DEFRA sets out progress in mapping and developing the baseline of its stock of regulations and looks at ongoing work to deliver the 25% target of reduced administrative burdens, and many other initiatives that will simplify regulations for department stakeholders.

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<sup>18</sup> *Regulation – Less is More: Reducing Burdens, Improving Outcomes*, Better Regulation Task Force, March 2005. From 1 January 2006 the Better Regulation Task Commission took over the duties of the Better Regulation Task Force.

<sup>19</sup> *Lifting the burden: DEFRA Initial Regulatory Simplification Plan*, DEFRA, November 2005

### *Principles and Code of Practice*

- 44 The benefits of these powers come from added incentives and guarantees on changes in regulatory practice to base regulation more closely on risk, and make regulators' actions more transparent and proportionate. We expect the benefits to be considerable, but they are not directly quantifiable.

### *Regulatory Reform and Europe*

- 45 The inclusion of proposals concerning implementation of European legislation will bring benefits in the form of more accessible, easier to understand domestic legislation and a reduced number of statutory instruments required.

## **Costs**

- 46 As stated above, the Bill contains enabling powers, and accordingly has no directly attributable costs or benefits. It is therefore not possible to provide detailed, finite quantification of the likely costs of any of the options as any costs arising from its use relate to orders made under its powers. Each order made using the Part 1 power must be accompanied by an explanatory document which includes a cost/benefit analysis, and Regulatory Impact Assessments are completed in the normal way, identifying costs and benefits for each order proposed under the Bill.

### *On-going costs*

- 47 There are, however, ongoing costs in delivering the order-making programme. The Cabinet Office provides a monitoring and support function in relation to orders made under the 2001 Act, and trains policy officials on the order-making process. This will continue under each of the options and any increase in the pace of delivery of orders will result in additional experience at departmental level of the relevant work, which can be harnessed by the BRE to spread best practice in the departments.
- 48 Departmental officials spend time on drafting the order and supporting documentation: the latter includes a consultation document, an explanatory document and an accompanying statement. Departmental officials liaise with Cabinet Office officials on draft orders and supporting documentation.
- 49 The order making powers have been designed to ensure that the paperwork required for orders is proportionate to the size and impact of the proposal.

## **Equity and fairness**

- 50 The proposals consulted on assumed that the Bill will retain the current safeguards, to ensure equity and fairness. The current safeguards will be retained, but adapted and applied comprehensively to all reforms, as set out in option 4 above.

## **Small Firms' Impact Test**

- 51 The public consultation on the proposals included organisations representing small businesses. Responses were received from the Small Business Council ('SBC') and the Federation of Small Businesses ('FSB'), which were broadly very supportive. The FSB commented that "The body of legislation seems to grow interminably and any efforts that facilitate the necessary spring-cleaning of the overall body of law should surely be welcomed." The SBC commented that "any measures that make the RRO system more effective, especially in decreasing the regulatory burden on businesses and enabling Parliament to scrutinise proposals effectively, are to be welcomed".

## **Competition assessment**

- 52 The Bill contains enabling powers and in itself has no effect on competition. Each new order made under the enabling powers will be accompanied by a Regulatory Impact Assessment, which will include an assessment of any impact the proposals may have on competition.

## **Enforcement and sanctions**

*How will the proposal be enforced?*

- 53 Although there will be no formal enforcement, the BRE will raise awareness of the process and the type of reforms which can be delivered by this route across Whitehall and beyond, for example by delivering presentations and holding workshops. The BRE will also seek the advice of the Parliamentary Committees on the supporting guidance that is produced to assist Government departments in the development of proposals for orders made under this Bill. Departments will be responsible for developing their proposals, which will be fully consulted on. Parliament will be the final judges of the appropriateness of proposals for delivery by the order-making procedures.

*Who will enforce this legislation?*

- 54 The proposed legislation will create an enabling power, widening the current power to make orders reforming the law. All draft orders will be laid before the Parliamentary Committees for scrutiny.

*Will the legislation impose criminal sanctions for non-compliance?*

- 55 No.

## **Monitoring and review**

- 56 Sunset clauses are not appropriate for the Legislative and Regulatory Reform Bill as its powers are intended to be used as an ongoing tool to deliver legislative and regulatory reform and simplification. The Bill and new processes will, however, be monitored and reviewed within three years of the date the Bill is enacted.

## **Implementation and delivery plan**

- 57 It is intended that the Bill will come into force 2 months after the date of Royal Assent. The Bill includes transitional provisions for any existing RROs undergoing Parliamentary scrutiny. The Bill is accompanied by Explanatory Notes. A training programme will be developed for departmental officials and a working group, comprised of officials that have taken through an RRO, will be established to assist with the revision of the guidance on making orders.
- 58 Departments will be encouraged to identify reforms included in their simplifications plans which are appropriate for delivery by order.
- 59 No decision has yet been taken as to whether to exercise the power, though the existing Enforcement Concordat is currently being updated to incorporate the Hampton principles. Any specific measures related to the Penalties Review will be taken forward after its completion, either through the general powers in this Bill or separate legislation as appropriate.<sup>20</sup> A final report with recommendations to Government will be published in late 2006.
- 60 Mergers will also be taken forward, either through the general order making power within the Bill or through other legislative vehicles already being prepared.

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<sup>20</sup> The review published 'Regulatory Justice: Sanctioning in a post-Hampton World' on 7 December 2005. Details of the review are available from [http://www.cabinetoffice.gov.uk/regulation/mergers\\_and\\_penalties/penalties\\_review.asp](http://www.cabinetoffice.gov.uk/regulation/mergers_and_penalties/penalties_review.asp)

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed by the Parliamentary Secretary, Cabinet Office

A handwritten signature in black ink that reads "Jimi Murphy". The signature is written in a cursive style with a large initial 'J'.

9 January 2006

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