

## ICAEW REP 08/05

### **A Bill for Better Regulation: Consultation Document**

*Memorandum of comment submitted in October 2005 to the  
Better Regulation Executive responding to its consultative document  
“A Bill for Better Regulation”*

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## INTRODUCTION

The Institute of Chartered Accountants in England & Wales welcomes the opportunity to comment on the consultation document *A Bill for Better Regulation*, issued in July 2005 by the Better Regulation Executive. The Institute is the largest professional accountancy body in Europe, with more than 127,000 members running or advising businesses across every sector of the UK economy. The Institute works in the public interest and operates under a Royal Charter.

## GENERAL COMMENTS

The Regulatory Reform Act 2001 (RRA) allows Parliament to use secondary legislation, known as Regulatory Reform Orders (RROs), to amend primary legislation. This power occurs relatively rarely in Acts of Parliament, and its use under the RRA is currently restricted to legislation

1. to remove, reduce, re-enact or impose regulatory burdens.

The Government's proposals would extend this mechanism so as to allow the RRA to be used in addition:

2. to simplify legislation, and
3. to implement uncontroversial Law Commission recommendations, including those that amend common law.

Although, as the consultation document explains, the proposed extensions to the RRA would facilitate regulatory reform, they would also significantly alter the nature of the legislation. At present, it is the restriction to removing burdens etc that ties the legislation to regulatory issues. There appears to be no similar tie proposed for the new powers and, without it, they could be used in relation to non-regulatory matters. The revised RRA could therefore become a fast-track mechanism for amending primary legislation on any subject where the amendments are uncontroversial, provided they fit into at least one of the three categories now proposed. The key issue here does not, therefore, appear to be one of exclusively regulatory reform, but of the appropriate procedures for amending primary legislation on a potentially wide range of issues.

Parliament has limited time to consider the vast amount of proposed primary and secondary legislation put before it each year. It is therefore important that it should be able to focus its time on those issues that are most important or controversial, and it is for this reason that fast-track mechanisms exist to pass secondary legislation. As the consultation paper notes, these are of three types, in ascending order of difficulty (or thoroughness of scrutiny):

- a negative procedure;
- an affirmative procedure; and
- a super-affirmative procedure.

The RRA requires the use of a super-affirmative procedure. The consultation document summarises this as follows:

“It consists of an initial 60 day scrutiny period, during which the draft proposal is considered by the [Regulatory Reform Committee of the House of

Commons] and the [Delegated Powers and Regulatory Reform Committee of the House of Lords]. The Committees then report to their respective House, and they may recommend that the proposal should proceed, not proceed, or proceed only in an amended version. The Government must take account of the Committees' reports and any other representations made before finalising the draft Order.

“The draft Order can then be laid for consideration by both Committees, who then report on it within 15 sitting days of laying, recommending whether or not the draft Order should be approved. The Government can then bring forward the draft for approval by a resolution of each House. Once the draft Orders have been approved by both Houses, they are made by the Minister responsible.”

The RRA also incorporates safeguards intended to ensure that RROs do not remove necessary protections or interfere with the reasonable enjoyment of rights or freedoms and that they satisfy tests of proportionality, fair balance and desirability. The consultation document also explains that proposed RROs are subject to mandatory public consultation.

For various reasons, desirable amendments to primary legislation will often be relatively uncontroversial, and we believe that it is appropriate to allow such amendments to be made through secondary legislation, but with appropriate safeguards, which we believe the super-affirmative procedure and the other safeguards in the RRA provide for RROs. We therefore support the main thrust of the Government's proposals, although, as in the form proposed they potentially go well beyond regulatory reform, we do not think that this is the right way to introduce them.

In our view it would be inappropriate to introduce general measures that provide for simplification of the law and for the implementation of Law Commission proposals in a Regulatory Reform Act (any more than one would include them in, say, a Companies Act or a Finance Act). The appropriate mechanism would be something in the nature of a Law Reform Act.

Nor do we consider that the Better Regulation Executive is the best possible body to bring forward such potentially far-reaching proposals. The Department for Constitutional Affairs would seem to be more appropriate, and we are concerned that potential consultees on these issues who would normally comment on proposals from the DCA, may not be commenting on them because they mistakenly believe the proposals to be about regulatory reform rather than wider issues of law reform.

We therefore recommend that ideally the Government should proceed in one of two ways.

- Either some limitation should be introduced into the proposed legislation so that both the simplification and Law Commission proposals are restricted to matters of regulatory reform.
- Or, if the present very wide scope of the proposals is retained, we believe that it would be more appropriate to incorporate them in a different legislative vehicle, which should probably be the subject of a fresh public consultation led by the Department for Constitutional Affairs.

As we support the substance of the Government's proposals, but do not think that the way in which it is proposed to introduce them is ideal, we recommend the second route, although we recognise that it would involve some delay.

While these two options set out what seem to us to be the best approaches, there may be other ways of making it clear – for example, in the title of the Bill introducing the proposed reforms and in the titles of the Orders that would be used under the amended the amended legislation - that the measures concerned go beyond regulatory reform.

Finally, where powers to amend primary legislation by secondary legislation already exist or will be created under other Acts of Parliament, it is important that the safeguards in these other Acts should not in any way be diminished by the proposed amendments to the RRA. It would be helpful if the legislation to implement the proposals in the consultation document could be co-ordinated with any similar proposals emerging from other Departments – for example the Department of Trade and Industry's proposals in relation to Company Law Reform.

## **SPECIFIC QUESTIONS: Amending the Regulatory Reform Act 2001**

### ***Burdens, simplification and Law Commission proposals***

#### **Recommendation One**

**Orders under the amended 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 proposals.**

**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**

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

#### **ICAEW comments**

- 1. We do not consider that the RRA is an appropriate Act in which to provide for simplifying legislation or implementing uncontroversial Law Commission proposals where these are unrelated to regulatory reform. However, we would support the proposed changes if they were either (1) embodied in the RRA but limited to regulatory reform or (2) preferably, embodied in an appropriate,**

more general Act if they are to remain as far-reaching as they are in the consultative document.

2. The consultation document notes that the meaning of “burden” in the Act excludes the ordinary meaning of the word, which could include the administrative bother or expense associated with a regulation. We recommend that the meaning of “burden” in the Act should be extended so that it includes the ordinary meaning of the word.
3. We support the Government’s proposal, provided that, if the proposals are to be implemented in the RRA, there is some way in which they are limited to regulatory reform. The RRA does not define what “regulation” means and “the burdens element” is one of the ways in which the scope of the RRA is restricted to regulatory reform rather than made something more wide-ranging.

### **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?**

#### **ICAEW comments**

As noted, the RRA does not define what “regulation” means. The reference in Section 1 to “reforming legislation which has the effect of imposing burdens affecting persons in the carrying on of any activity” is in effect a substitute for such a definition, and is presumably intended to limit the Act to *regulatory* reform as opposed to the reform of anything else. While we see the force of the argument for removing the restrictiveness of the particular word “activity”, the RRA needs some provision that makes it a Regulatory Reform Act rather than a General Purpose Reform Act. We consider, therefore, that the amended Section 1 should be in a form that still in some way limits the scope of the Act to regulatory reform.

### **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 or reduce burdens on Ministers or government departments should be removed?**

#### **ICAEW comments**

We support the Government’s proposal.

### ***The simplification power***

### **Recommendation Four**

**Recommendation [One] 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;**
- **restituting 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 ... and where it would inhibit the overall reforms proposed if substantive change was not allowed.**

### **Questions**

- 1. Do you agree that proposed simplification powers should be defined in this way?**
- 2. Are there additional examples of simplification that we should include in the scope of the powers?**
- 3. Do you agree that the simplification power should allow for some substantive amendments to legislation? In what circumstances would substantive change be appropriate?**
- 4. 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?**
- 5. Are the safeguards proposed adequate or are there specific data-sharing issues that would mean that additional safeguards would be necessary?**
- 6. Can you identify any specific instances where responsible data-sharing would remove burdens on business or others?**

### **ICAEW comments**

1. As stated above, we do not support the inclusion of a power relating to simplification of primary legislation unrelated to regulatory reform in a Regulatory Reform Act. However, if a power relating to simplification is to be introduced, then the definition proposed is satisfactory.
2. We are not aware of any additional examples that it would be appropriate to include.
3. We support the Government's proposals. We suggest that the procedural safeguards for substantive amendments should be the same as those that apply at present to RROs.
4. We support the Government's proposals.
5. We believe that the proposed procedural safeguards – i.e., if our understanding is correct, those that apply already to RROs, including mandatory public consultation – should be sufficient. We would draw attention to the risk that amendments that are intended to be purely simplificatory can have unintended effects in changing the meaning of legislation or opening up doubts as to its

interpretation. It is therefore important that the safeguards for this kind of RRO include careful public and Parliamentary scrutiny.

6. We do not have any specific proposals.

### *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 reform of the common law?**

#### ICAEW comments

We support the Government's proposal, but do not consider that the RRA is the most appropriate place to implement it.

### *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**

- 1. Do you agree that current safeguards should be maintained and applied comprehensively across all three types of Order?**
- 2. 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?**

#### ICAEW comments

1. We support the Government's proposals.
2. The need to extend the safeguards arises primarily from the fact that the proposed new powers do not relate to removing regulatory burdens. While we have no objection to a wider impact assessment for the new kinds of power, we believe that - if the new powers are included in the RRA - the new extended provision should not be worded in such a way as to lose any of the existing requirement in relation to the existing regulatory burdens power.

### *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?**

#### ICAEW comments

We agree that RROs should be capable of being used to amend primary legislation that is less than two years old.

### *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?**

#### ICAEW comments

We support the Government's proposals.

### *Parliamentary scrutiny*

#### **Question**

**What should be the limits to the reforms that could be delivered by this route?**

#### ICAEW comments

The consultation paper makes it clear that this question arises because the Government doubts whether the present approach, under which *large proposals* or *proposals having a broad impact* are liable to be deemed inappropriate for the RRA procedure, is the right one. We agree with the Government's concerns, and do not consider that mere size or breadth of impact should be relevant considerations. The test should instead be the degree of consensus or controversy surrounding the main points in the proposals. We also agree that controversy on points of detail should not in itself be a bar to using the procedure.

#### **Questions**

**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 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?**

ICAEW comments

In our view, it is desirable that all RROs – and the new Orders relating to simplification and Law Commission proposals - should receive the same level of scrutiny in principle and that this should be provided through the super-affirmative procedure. Although this approach may seem to be unduly cumbersome in some cases, both departments and Parliament in practice no doubt devote less time to considering smaller and less complex measures. Applying “the same level of scrutiny” to all measures should therefore be less onerous in practice than it might sound.

We are also concerned as to which measures might be selected for a lower level of scrutiny. For example, it might appear sensible for measures that are intended purely to simplify the drafting of the law and not to change it in substance to receive an even faster fast-track treatment. It is our experience, however, that changes in wording can either introduce unintentional changes or at least give scope for uncertainty - which ultimately has to be resolved by the courts - as to whether they have done so. The effect of this, perversely, is to introduce greater complexity, increasing burdens where it is intended to reduce them.

The procedures for amending primary legislation through secondary legislation are still relatively new, and while there may well come a time when, in the light of experience, reductions in the level of scrutiny now employed can be safely introduced, we do not think that that point has been reached yet.

### ***Reform of private or hybrid legislation***

#### **Questions**

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

ICAEW comments

1. This proposal raises similar concerns to those for simplification and for implementation of Law Commission recommendations. While we support the proposal in principle, if its scope goes beyond reforms that address regulatory matters, then this does not seem to be the most appropriate way to introduce it.

2. We believe that if a power to reform private and hybrid legislation by Order is introduced, it should be subject to the same safeguards in substance that apply now to the reform of such legislation.

## **Specific questions: implementing the Hampton review**

### ***Enforcement Concordat***

#### **Questions**

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

#### ICAEW comments

1. This would involve placing much greater weight than at present on risk assessment in the enforcement of regulations. We support this change.
2. In our view the Concordat should be extended to national regulators.
3. We would also support its being put on a statutory footing.

### ***Mergers***

#### **Question**

**Should the Government take a power, as described above, to update regulatory structures?**

#### ICAEW comments

The proposal is to take a power to merge regulators. We support this proposal.

#### **Question**

**Are the safeguards proposed adequate to ensure the powers are used appropriately?**

#### ICAEW comments

Except for proposing the use of a super-affirmative procedure, the consultation document describes what the safeguards will be provided for rather than what they will be. If, as (to some extent) proposed in the document, the safeguards ensure that:

- merger powers are used only for the purpose of merging the regulatory bodies in question and transferring their existing relevant regulatory functions to the new merged regulator;
- proposals for mergers are properly scrutinised by Parliament and other stakeholders;
- merger powers only extend to regulators, and not to other types of government bodies;
- the power is only used in comparatively simple cases;
- it would not be used where new powers or new regulatory functions are being granted; and
- it would not be used where a merger would involve the merger of large regulators, or where mergers would be accompanied by major regulatory change;

then in our view they would be adequate.

### **Question**

**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?**

### ICAEW comments

As circumstances change, there may be a case for further regulatory mergers beyond those identified in the Hampton review. We do not believe, therefore, that the proposed power should be restricted to possible mergers identified in the review.

### *Penalties*

### **Questions**

**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?**

### ICAEW comments

We do not believe that changes in penalty regimes, which might mean the imposition of more severe penalties, are appropriate for inclusion in the proposed bill.

Businesses will respond to prospectively heavier penalties by changing their systems and procedures so to avoid them. While this may, as is no doubt intended, secure the desirable result of improved compliance with regulations, which we certainly support, it can also impose significant cost burdens on businesses. These cost implications should receive fuller consideration and debate than the RRO procedure allows.

[Brian.singleton-green@icaew.co.uk](mailto:Brian.singleton-green@icaew.co.uk)