



REFORMING THE BETTER REGULATION FRAMEWORK

CIEH response to Department for Business, Energy and
Industrial Strategy consultation

October 2021

About the Chartered Institute of Environmental Health (CIEH)

CIEH is the professional voice for environmental health representing over 7,000 members working in the public, private and third sectors, in 52 countries around the world. It ensures the highest standards of professional competence in its members, in the belief that through environmental health action people's health can be improved. Environmental health has an important and unique contribution to make to improving public health and reducing health inequalities. CIEH campaigns to ensure that government policy addresses the needs of communities and business in achieving and maintaining improvements to health and health protection.

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CIEH welcomes the opportunity to comment on this important consultation. Against a backdrop of EU exit, climate change, a global pandemic and new technologies, the world is changing faster than ever, presenting unprecedented challenges for government, regulators and the regulated.

Local authority environmental health services have an excellent track record of working with businesses at a local level. Through the government's Better Business for All (BBfA) scheme partnerships have been formed across the country between businesses and regulators to promote business growth and support businesses in getting regulation right first time.

Through the government's Primary Authority Scheme, environmental health practitioners provide businesses with assured and tailored advice on meeting the requirements of regulations through a single point of contact. This ensures start-ups get it right at the outset and enables all businesses to invest with confidence in products, practices and procedures, knowing that the resources they devote to compliance are well spent.

The proposals in this consultation have far reaching consequences for government, regulators and the regulated. We would welcome the opportunity to discuss the proposals and our response in more detail with government.

The common law approach to regulation

Q1: What areas of law (particularly retained EU law) would benefit from reform to adopt a less codified, more common law-focused approach?

Q2: Please provide an explanation for any answers given.

Q3: Are there any areas of law where the Government should be cautious about adopting this approach?

Q4: Please provide an explanation for any answers given.

Regulation is used to protect and benefit people, businesses and the environment and to support economic growth. Regulation is one of the primary ways in which government can achieve its policy objectives e.g. clean air, safe homes and safe food. Without regulation there is a risk that policy objectives will not be achieved and the public interest not best served.

The proposal in the consultation is to move away from setting out detailed rules in regulations and instead delegate more power and discretion to regulators, replacing prescriptive statutory frameworks with outcomes to be achieved. Regulatory regimes would then be shaped more by case law rather than primary or secondary legislation.

Whilst this approach could allow regulators to respond more quickly to new technologies and other changes in circumstances, a shift away from prescriptive statutory regimes, leaving regulators to shape the detail in individual regulatory areas, could mean more court time taken with regulated parties defending prosecutions or other sanctions – for example, if the requirements were too vague and uncertain.

Businesses continually tell us they just want to know what they have to do to comply. They need certainty, no grey areas and consistency in their dealings with regulators across the UK. We believe that adopting a less codified, more common law approach as an alternative to prescribed standards is unlikely to reduce burdens on business. In fact, it is likely to have the opposite effect and cost businesses more in the long term.

This will particularly be the case for small businesses who are less likely to have access to ongoing advice from their own experts and legal teams.

Q5: Should a proportionality principle be mandated at the heart of all UK regulation?

Q6: Should a proportionality principle be designed to

- 1) ensure that regulations are proportionate with the level of risk being addressed and**
- 2) focus on reaching the right outcome?**

Q7: If no, please explain alternative suggestions.

The consultation states that ‘some of the current regulatory standards the UK has inherited from the EU are based on an overly restrictive interpretation of the precautionary principle’. It suggests, therefore, that ‘a new ‘Proportionality Principle’ ... should be mandated at the heart of all UK regulation. Under this principle, the Government would focus on regulating in a proportionate way.’

We are not aware of any evidence that the precautionary principle has ever been taken too far, in the UK. Regulation and regulators should be proportionate, this is nothing new.

The role of regulators

Q8: Should competition be embedded into existing guidance for regulators or embedded into regulators’ statutory objectives?

- a. Embedded into existing guidance**
- b. Embedded into statutory objectives**
- c. Creating reporting requirements for regulators**
- d. Other (please explain)**

Q9: Should innovation be embedded into existing guidance for regulators or embedded into regulators’ statutory objectives?

- a. Embedded into existing guidance**
- b. Embedded into statutory objectives**
- c. Creating reporting requirements for regulators**
- d. Other (please explain)**

Q 10: Are there any other factors that should be embedded into framework conditions for regulators?

The proposal in the consultation is to give regulators a duty to promote competition and innovation. This would be in addition to their current statutory obligations ‘to design their service and enforcement policies in a manner that best suits the needs of businesses and other regulated entities’ and consider ‘the potential impacts of their activities and their decisions on economic growth’. This proposal would require regulators to make subjective judgements in respect of which they may neither be accountable nor best placed. **The proposals therefore should be a. embedded into existing guidance rather than embedded into statutory objectives.**

Q11: Should the Government delegate greater flexibility to regulators to put the principles of agile regulation into practice, allowing more to be done through decisions, guidance and rules rather than legislation?

Whilst delegating greater flexibility for regulators to put the principles of agile regulation into practice, allowing more to be done through decisions, guidance and rules rather than legislation will provide them with more flexibility, the risks explained in response to Q1-Q4 will be the same.

Local authority environmental health practitioners take a risk based, pragmatic approach to applying regulation and have a degree of flexibility in how they prioritise their work.

Q12: Which of these options, if any, do you think would increase the number and impact of regulatory sandboxes?

- a. legislating to give regulators the same powers, subject to safeguarding duties
- b. regulators given a legal duty
- c. presumption of sandboxing for businesses

Q 13: Are there alternative options the Government should be considering to increase the number and impact of regulatory sandboxes?

A regulatory sandbox enables innovators to trial new products, services and business models without some of the usual rules applying. We have insufficient knowledge/experience of regulatory sandboxes to comment.

Question 14: If greater flexibility is delegated to regulators, do you agree that they should be more directly accountable to Government and Parliament?

Question 15: If you agree, what is the best way to achieve this accountability? If you disagree, please explain why?

If more flexibility is delegated to regulators they should be more directly accountable to Government and Parliament.

Q16: Should regulators be invited to survey those they regulate regarding options for regulatory reform and changes to the regulator's approach?

Regulators need to balance the sometimes competing needs of many different stakeholders, including businesses and consumers. As well as engaging with those they regulate regulators need to engage with consumers and consumer groups to enable regulation to be designed to meet their needs. However, different consumers have different needs, and we appreciate that balancing these needs can be a complex task. We think there should be better coordination between regulators and with government, not just to consider the cumulative impact of regulation on businesses but also on local authorities as co-regulators. This was a recommendation of the Cross Government group set up to consider pressures on local authority regulatory services.

Question 17: Should there be independent deep dives of individual regulators to understand where change could be introduced to improve processes for the regulated businesses?

The proposal is for government to conduct a series of deep dives into individual regulators and act as a critical friend to develop recommendations for the regulator to consider. Such deep dives would involve shadowing the regulator to look at its practices and procedures, scrutinising the regulators' appraisals of regulatory change and talking to customers directly and would be used to identify areas where change could be introduced to smooth processes for the regulated businesses. We have some concerns that the

independence of regulators may be compromised by this process and pressure could be applied to encourage light touch rather than right touch regulation.

Revising the process and requirements of better regulation

Q18: Do you think that the early scrutiny of policy proposals will encourage alternatives to regulation to be considered?

Q 19: If no, what would you suggest instead?

Q20: Should the consideration of standards as an alternative or complement to regulation be embedded into this early scrutiny process?

Yes, we believe there should be early and robust scrutiny and challenge of regulatory proposals to fully explore alternatives to regulation. Scrutiny should be independent of government which will ensure policy is based on the best available evidence.

We believe technical scrutiny of regulatory proposals by experts at an early stage is important in supporting the democratic process and that scrutiny should be delivered transparently.

Q21: Do you think that a new streamlined process for assessing regulatory impacts would ensure that enough information on impacts is captured?

Q22: If no, what would you suggest instead?

Q 23: Are there any other changes you would suggest to improve impact assessments

No. The process for assessing regulatory impacts should consider indirect as well as direct impacts as well as wider impacts, both positive and negative, such as on health, wellbeing and trade. Impact assessments should also include an appraisal of the impacts on regulators of implementation, be transparent and clearly communicated to anyone who may be affected and Parliament.

Q 24: What impacts should be captured in the Better Regulation framework?

Select all which apply:

- a. Innovation**
- b. Trade and Investment**
- c. Competition**
- d. Environment**

25: How can these objectives be embedded into the Better Regulation Framework? Can this be achieved via:

- a. A requirement to consider these impacts,**
- b. Ensuring regulatory impacts continue to feature in impact assessments,**
- c. Encouragement and guidance to consider these impacts, but outside of IAs,**
- d. Other? (please explain)**

Our initial thoughts are that it may not be appropriate for all the impacts listed in Q24 to be equally applicable to all regulators and this should be reflected in the Better Regulation Framework.

Scrutiny of regulatory proposals

Q26: The current system requires a mandatory PIR to be completed after 5 years. Do you think an earlier mandated review point, after 2 years, would encourage more effective review practices?

Q27: If no, what would you suggest instead?

Q28: Which of the options described in paragraph 3.4.10 would ensure a robust and effective framework for scrutinising regulatory proposals?

- a. Option 1
- b. Option 2
- c. Option 3
- d. Other (please explain)

We strongly advocate a rigorous approach to assessing the impact of regulation and support a mandated review after 2 years. **Option 2, scrutiny by an independent body**, operating independently from government would ensure a robust and effective framework for scrutinising regulatory proposals.

Measuring the impact of regulation

Q29: Which of the four options presented under paragraph 3.5.4 would be better to achieve the objective of striking a balance between economic growth and public protections?

- a. Adjust
- b. Change
- c. Replace
- d. Remove
- e. Other (please explain)

In accordance with the June 2021 recommendation of the [Independent report from the Taskforce on Innovation, Growth and Regulatory Reform](#), **we support option c replace**. Introducing a new system i.e. the use of a scorecard to measure the impact of a wide range of government priorities such as on environment and trade as well as those that are difficult to monetise, such as wellbeing, would show at a glance the direction of travel.

Regulatory offsetting: One-in, X-out

Q30: Should the One-in, X-out approach be reintroduced in the UK?

Q31: What do you think are the advantages of this approach?

Q32: What do you think are the disadvantages of this approach?

Q34: How best can One-in, X-out be delivered?

One-in-one-out was introduced in 2010 to help deliver the government's commitment to reducing the cost and volume of regulation, in particular the regulatory burden on business. It encouraged Government Departments to consider non-regulatory ways of achieving their policy goals rather than introducing new legislation, requiring them to assess the "net cost to business" of complying with any proposed regulation

(an 'IN'), and find a deregulatory measure that offset the cost of the new regulation (an 'OUT'). It was progressively expanded to "one-in-three-out."

We would not support the reintroduction of the One-in, x- out approach in the UK as there is little evidence to demonstrate it generated the expected results. A 2016 National Audit Office report, [*The Business Impact Target:cutting the cost of regulation*](#), concluded that government had made limited progress in reducing regulatory costs, departments generally had no idea about the costs of legislation and they generally disregarded wider social and economic impacts. Further, One-in, x-out introduces an additional layer of analysis into the law-making process, potentially creating delays and reducing the ability of policy makers and regulators to adjust flexibly to the rapid pace of economic, technological and social change and innovation.

While we accept that One -in, x-out may have been useful in identifying and repealing outdated legislation, this can be achieved through good legislative housekeeping.

Rather than allocating resource to pursue a one-in-x-out regulatory system, government should use the resource to produce better impact assessments, consultations and evaluations and require departments to show through evaluation that legislation on the statute books is generating expected benefits and that any new initiatives are soundly justified through impact assessments.

Q33: How important do you think it is to baseline regulatory burdens in the UK?

The UK has never baselined the full costs of its regulations. Businesses tell us it is the cumulative impact of regulation that is burdensome. **We think baselining regulatory burdens in the UK is b. somewhat important.** Working from a known baseline would allow more flexible approaches than One-in, x-out and enable meaningful measures of progress in reducing regulatory burdens.