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## **Reflexive Governance in Better Regulation: Evidence from Three Countries**

By Ciara Brown and Colin Scott

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# **Reflexive Governance in Better Regulation: Evidence from Three Countries**

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# **Executive Summary/Conclusions**

## **Introduction**

In the face of concerns that regulation imposes excessive burdens on businesses and others and is more limited in its effects than is desirable, many governments and supranational bodies, including the European Commission and the OECD, have sponsored programmes of regulatory reform. These reforms, increasingly clustered around the concept of better regulation, have tended to focus on the implementation of some form of cost-benefit analysis over new regulatory rules, and sometimes existing regimes. Elements of these programmes geared towards more fundamental evaluations of the reasons for regulating and the variety of alternative instruments for seeking policy outcomes appear to have received less emphasis.

This working paper reports on research in three countries – Ireland, the UK and Australia – which investigates the extent to which there has been experience of ‘reflexive governance’ within or alongside better regulation programmes. Reflexive governance is a concept which captures the idea of policy making and implementation processes which seek to engage all those involved in regulatory regimes thinking about not only the appropriate instruments but also the objectives and desirable outcomes for a regime. Such a reframing both of instruments and expectations for regulation goes beyond the more traditional cost-benefit analyses in the search for effective and appropriate regulation. Accordingly reflexive governance harnesses collective capacities for problem-solving. There is limited evidence in all three jurisdictions of such reflexive governance, reported in this paper. From this evidence we offer institutional proposals for enhancing the effectiveness of better regulation regimes through the enhancement of the more reflexive processes.

## **Reflexivity and Ireland’s Experience with Better Regulation**

Ireland is a small society, with a small and open civil service and a long tradition of accessibility by citizens to both politicians and public servants. Coupled with the fact of manageable size, the community of key stakeholders is likely to be well known to public servants, principally due to the 20 year-old system of regular dialogue through social partnership structures. The positive benefit of this is the increased likelihood of stakeholder engagement and a real influence for stakeholders in shaping the policy agenda. One risk is that government may associate the interests of the country with the interests of these key stakeholder groups to an extent that is not justified. Within this context the growth of regulatory agencies in recent years, with a degree of independence from elected politicians, has the potential to correct for this risk.

Views of informants were mixed as to how much influence stakeholder input has on shaping policy processes. However, it may well indeed be the case that, as so many officials have argued, proposals are already well worked-up in conjunction with stakeholders, prior to their release into the public domain. This would imply that reflexivity may well be going on, but it is invisible, and arguably rather limited as to the range of participants involved. Once a proposal is published, other than the public dimension to ensuing a consultation process which is more about transparency than shaping the proposal, the job is effectively more or less complete.

The strong tradition of informal consultation with stakeholders at the development stage of policy is where we have located most evidence of learning and reframing. In addition, organisations such as the Environmental Protection Agency also offer evidence of reflexivity, both in the approach to stakeholder engagement and in openness to reframing and common problem-solving.

There is an awareness of the limited penetration of such reflexive governance processes in Irish public policy. In the 2005 National Economic and Social Council Strategy Review (forerunner of Towards 2016), which considered current problems in Ireland's administration and particularly the future for social partnership, it is pointed out that many participants believe that there has been less success with addressing structural and supply-side issues, than with macro-economic issues in the early days and, more generally, pay. In addition, NESC suggests that, while Ireland has proved it 'knows how to do high-level bargaining, it has not (yet) created institutions and processes capable of genuine multi-level problem-solving'. The incompleteness of the evolution, according to O'Donnell (2008), needs to be seen in context. Partnership still has to work within a state's administrative and constitutional framework. Since Ireland has a written constitution, change necessarily comes slowly. Yet, many of the issues nowadays being considered in the partnership system have constitutional implications.

Questions that NESC has posed include whether outcomes in the future will tend to the lowest common denominator, with limited care for the common good? 'The answer depends to a large degree on the use of the government's legitimate authority to embed negotiations in a way that maximises problem-solving.'

The structures of social partnership, especially its associated informal consultation forums possibly offer the richest potential for (and examples of) reflexivity. The lack of transparency makes it difficult to track processes or produce detailed evidence. In the context of Better Regulation, *per se*, teething problems exist around alleged lack of analytical expertise in cost-benefit analysis, a lack of transparency, resorting to minimal screening Regulatory Impact Assessments (RIAs) in the past and the possibility that many proposals are already largely agreed before entering the public domain. Therefore, until further experience with the system is to hand, and further tweaking of guidelines undertaken, it would be premature to claim that Better Regulation as it operates in Ireland offers a model for reflexive governance structures.

## **Reflexivity and the UK's Experience of Better Regulation**

Of the three countries studied the UK has the longest tradition of better regulation policies, dating back to the early 1980s. The Better Regulation regime is mature and embedded across all arms of government. Impact assessment, with a strong focus on cost/benefit analysis, is central to the UK's commitment to evidence-based policymaking. Key features of the UK approach include very high levels of transparency and rigorous analysis. Examples of reflexivity, shared learned learning and collaborative problem-solving certainly exist, but these are not always to be found within or as a result of Better Regulation practices. In fact, we could conclude that, as one civil servant put it, 'the rigidity of Better Regulation is its Achilles heel'. Some argue that perhaps the nature of Britain's approach to impact assessment and to consultation itself is overly-prescriptive and this lack of flexibility, noted by many, militates against reflexive governance. Instead, we find that reflexivity, where it occurs, is happening out of sight, in earlier informal consultation with key stakeholders or other imaginative, collaborative approaches. That said, a new Code on Consultation has only recently come into force and it does appear to facilitate a greater degree of

flexibility. It remains to be seen how that will evolve and how it might affect future proposals. Interviewees emphasised the overarching importance of the processes and forums by which you bring people together in consultations and on *who* you target. This resonates with some criticism in Ireland of the operation of social partnership and also with British civil servants' complaints about 'London head office agendas'.

On impact assessment, it has been suggested that politicians may be interested in it as a way of modernising the state and increasing the transparency of the policy formulation process. It may also be a way of legal-proofing their decisions. However, it has been noted by some that initial administrative conditions and cultural style are key to how innovations like impact assessment develop in different countries. One academic notes that precepts of Better Regulation, including impact assessment, work better in countries like Sweden or Finland which did not ever have a Napoleonic constitutional model, but instead have a strong constitutional tradition of rulemaking by non-elected bodies (with all the appropriate checks and balances such as public scrutiny, oversight and elected Boards), while the system of regulatory governance in the US ties in with its system of semi-independent administration. These different constitutional settings were argued to be more conducive to new modes of regulatory governance – including both Better Regulation itself and reflexivity – than countries such as Britain (and, arguably also Ireland, whose governance structures are based on the British model, with the difference of a written constitution).

Finally, as a top civil servant expressed it, 'Better Regulation is a brand, hoping to become a discipline. But it is not owned by those implementing it. The brand itself is not even well-liked by policymakers outside [the Department of Business, Enterprise and Regulatory Reform].' And, in addition, this respondent suggested that, however strategic policymakers try to be in developing better quality regulation or even joined-up thinking about policy, 'we are always hit by events. Dealing with externalities takes up most of civil servants' time and politicians will always be ready to abandon Better Regulation principles whenever urgent politics demands it'.

## **Reflexivity and Australia's Experience with Better Regulation**

Once again, as in the other two jurisdictions researched, Australian Better Regulation systems offer few rich examples of reflexivity. This is largely due to the increasingly narrow focus (everywhere) of Better Regulation practitioners on a gatekeeping role. However, the Australian case does not show such strong evidence of a narrowing of focus to business interests, reduction of burdens or compliance costs as is the case with BR regimes elsewhere. In fact, the approach to Best Practice Regulation, as espoused in Australia, is both more flexible (e.g. in allowing more scope for qualitative analysis and accepting an absence of quantitative analysis) and broader in scope (e.g. taking a community-wide perspective as regards impact assessment). There appears to be a wider interest in outcomes and in benefits. This may be partly cultural/ideological and deliberate in intent (drawing on observation of experience elsewhere, especially in the UK), and/or also partly pragmatic, if the many comments about difficulties in obtaining robust data and research suitable for use in cost/benefit analysis are credible. Possibly, both factors are involved.

Australia has a leadership position in relation to its emphasis on building in review and evaluation mechanisms, even if these are not always perfect in practice, nor entirely universal across the different levels of government.

Australia also demonstrates innovation in approaches to consultation – at the level of the Productivity Commission (PC), Victoria Competition & Efficiency Commission (VCEC) and certain agencies such as the Victoria EPA and others. However, at the level of central government departments, consultation and also rigour in Regulatory Impact Statement (RIS) preparation may be less strong; certainly quality is considered variable by the relevant BR oversight body (the Office of Best Practice Regulation – OBPR). This, as in Ireland’s case, may be attributable to lack of understanding and awareness, lack of existing in-house relevant expertise, traditional positions on confidentiality and the overall newness of the regime. There is also perhaps the problem of reaching/communicating with stakeholders in a country the size of Australia. In addition, practices vary between the different levels of government.

There are issues with transparency. Compared to the UK in particular, the pattern in Australia (except in relation to the PC and VCEC) is of weaker standards of transparency.

Australia has long been considered an innovator in regulatory reform more generally. It is in this context that we are more likely to find evidence of reflexivity. Several bodies – among them various agencies in Victoria, also Standards Australia and the ACCC at the national level and the Office of the Legal Services Commissioner in NSW - have espoused alternatives to regulation and practised substantial engagement with stakeholders in order to collaboratively identify and solve problems. In the environmental arena in particular, we found several examples of cognitive reframing and shared learning which led to outcomes which were better for those affected by the regime than might otherwise have been expected. Interestingly, this also mirrors the Irish experience.

Although this would bear further research, initial indications from our research suggest that independent agencies may be inclined to be more reflexive (certainly more flexible, innovative and inclusive) in their approaches to stakeholder engagement, approaches to problem-solving generally and consideration of alternatives than are central government departments. This would mirror findings in Ireland and (with a few exceptions), also the UK. This comment should be tempered with views expressed by certain officials at the Commonwealth level in particular that were critical of perceived historical adversarial relationships between regulators and regulated parties. Furthermore though agencies may be more capable of engaging others in ‘thinking outside the box’ this must be set against the consideration that agencies typically lack the power to fundamentally change aspects of the regime, for example objectives set down in legislation.

From the perspective of institutional conditions that might foster reflexivity, Australia also offers the outstanding example of oversight structures such as the Productivity Commission and the (perhaps unique) system of consolidated reporting of key information and performance monitoring of regulators undertaken annually by VCEC in Victoria.

## **Institutional Proposals**

A key output from the reflexive governance research programme is to be a set of ‘institutional proposals’ – evidence-based recommendations for changed practices and reform. The proposals set down here are not universally applicable, but rather offer a checklist of measures which have met with some success in at least one of the three countries studied. The context and detailed application of these measures is considered in more detail in the country reports.



Before listing these, it might be useful to consider key strengths of the Better Regulation regimes within the three countries and consider the degree to which these foster reflexivity. In **Ireland**, the principal strength lies in the knowledge of stakeholders and pro-activity in engagement with them that exists within government. The system of social partnership has greatly contributed to the development of relationships, the building of trust and mutual learning. It has also in some cases provided ready-made deliberative forums and structures within which to carry out stakeholder consultation. A willingness to consider collaborative approaches to problem-solving exists. The **UK's** great strength lies in the quality and rigour of analysis. Long experience has meant that the system of impact assessment, cost/benefit analysis and consideration of alternative options is fairly much embedded across government. While not perfect quality on every occasion, there is real commitment to evidence-based policymaking. Meanwhile, recent revision of the Code on Consultation and new guidelines on impact assessment have introduced additional flexibility on the one hand and a commitment to ex-post evaluation on the other hand. Finally, the UK also leads in relation to transparency in the regulatory and policy development processes. **Australia** offers innovation in three key areas. First, in commitment to review and evaluation both through embedding of sunset clauses and as a result of the work carried out by organisations like the Productivity Commission and the Victoria Competition & Efficiency Commission. The latter two organisations, together with the performance monitoring undertaken by the Business Council of Australia, also provide strong, independent platforms for scrutiny and review of regulatory reform generally and can initiate debate. Second, Australia focuses on communitywide impact and has long experimented with alternatives to regulation. Third, although this is not universal across all arms of government, it appears to have innovated in relation to consultation processes and citizen engagement in particular.

If one had to identify principal weaknesses within the Better Regulation regimes which might be considered to hinder reflexivity, there are three that can be highlighted. All three exist in each of the three countries studied. First, formal public consultation, which is fundamental to much of Better Regulation, may be the least reflexive element in the entire process, as so much may have been determined prior to this phase. The real opportunity for reflexivity is likely to occur in early-phase policy development in consultation with key stakeholders, consequently it is in this context that transparency (or its absence) becomes a significant issue. Second, it can be argued that the alleged rigidity of impact assessment rules, especially in relation to cost/benefit analysis *may* sometimes militate against innovative solution-finding (especially if consideration of alternatives is sketchy), as compared with a more flexible approach to impact assessment that emphasises benefits as much as costs (and alternatives to pure cost/benefit modelling). Third, a prioritisation of business interests, or a focus on administrative burdens and targets *may* limit reflexivity and learning, as compared perhaps with a system that emphasises communitywide impacts to a greater extent. And finally, politics matters. The wishes of a Minister, an electoral manifesto or external events can all act against reflexivity by limiting civil servants' capacity to consider alternatives, by narrowing the scope of policy proposals proffered. Even in the best scenarios though, it is probable that in most cases collaborative learning, problem-solving and reflexive approaches still will largely centre around implementation and means of achieving goals. Our research has found that there is usually little room for deliberation of actual policy objectives.

Two key institutional conditions may foster reflexivity. These are: external, independent scrutiny and commitment to review and evaluation. Cultural conditions also have a role. An open and accessible public service can be very important, as is an existing tradition of consultation or public

enquiry, while it is also obvious that deliberation and relationship management is easier to facilitate in smaller societies.

Lastly, it is worth repeating here the finding that independent agencies may be more reflexive in their approach than central government (line) departments. The reasons for this might include, on the one hand, the statutory obligation on many such agencies to have regard to the consumer interest that tends to broaden the scope of thinking about impacts and benefits and also fosters innovation in consultation methods, and, on the other hand perhaps, a greater distance from any political pressure.

### **Evaluation Measures**

This set of measures is concerned with enhancing the capacity for evaluation of both information and alternative courses of action.

- Consider looking at outcomes; identify and improve ways of measuring ultimate outcomes against original decisions. Officials in all three jurisdictions highlight the difficulties inherent in conducting ex-post evaluations that link outcomes directly to specific decisions; ceteris paribus may not be possible. However, there appears to be increasing consensus that more effort is required and that a focus on outcomes may improve the fundamental quality of regulation
- Re-assess focus – administrative burdens or impacts defined more broadly? In Australia, it is noted that although impact on business is usually the trigger for an impact analysis to be undertaken, once triggered, equal weight is given to analysing social, consumer, environmental and other impacts. In addition, several independent regulatory agencies in the three jurisdictions point to their statutory consumer protection remit as a means of balancing other interests than merely business. In addition, it has been argued that even defining what constitutes a burden for business has become increasingly difficult
- Re-assess criteria – seek a rebalance between quantitative and qualitative analysis. While it is widely acknowledged that demanding quantitative analysis imposes a necessary (and sometimes previously absent) rigour on policy officials and greatly helps inform the decision-making process, the system should perhaps be open to consideration of qualitative analysis where appropriate (as is the case currently in Australia in particular), while the absence of quantitative data should not necessarily be a bar to decisions
- Involve policy officials in process; shorten the chain between policy debate and development and process gatekeeping; involve Better Regulation units or teams at an earlier stage in policy development or review the value of functional separation of Better Regulation responsibility and policy responsibility within central government departments
- Consider how widely impacts are assessed – is the depth of analysis and engagement adequate across all areas? Is the focus solely or mainly on business? Is this appropriate? Most officials with responsibility for Better Regulation gatekeeping in the three jurisdictions claim that attention is paid to wider impacts but that the quality of analysis is variable and there is inconsistency between approaches
- Precisely the same point can be made in relation to the quality of analysis and genuine engagement with alternative options. The commitment and the quality varies across arms of government, between departments and even between policy teams. A more visible and credible political commitment to this element is likely to improve performance
- Ensure/develop adequate research and data collection resources (for government; reducing dependence on inputs from regulated parties). The lack of independent research and data



appears to be more of an issue in Australia than elsewhere; clearly the more research that is available, the more informed the debate and the better the quality of decision-making is likely to be. Where officials are dependent on data from regulatees mechanisms can be designed to test this data, for example for the establishment of public fora at which the information is supplied and critiqued by others with knowledge of the relevant industry (for example competitors).

- Commission research and sectoral reviews. It is noted that institutionalisation of the research remit of the Productivity Commission in Australia and its output has raised debate about approaches to regulation and need for reform and brought considerable learning into the policy process
- Address skills weaknesses (economic analysis, econometric modelling etc) in civil service; invest in training. The issue of such skills weakness was highlighted by officials in Ireland and Australia as a possible contributory cause to poor quality impact assessments

### **Dialogic Measures**

Dialogic measures attempt to stimulate substantive discussions between parties within regulatory regimes. Indicators of success for dialogue might include evidence that parties' positions were changed, not only on instruments, but also on objectives for a regime.

- Create deliberative fora, including permanent stakeholder panels. One of the reasons that Better Regulation may not currently foster reflexivity is because dialogic measures in the main are constructed to invite comments but do not really constitute opportunity for participation in decision-making or collaborative problem-solving. A recasting of dialogic approaches might change that picture
- There are several models which officials point to as significant contributors to policy debate and development and where reflexivity can flourish. These include social partnership structures in Ireland, Ministerial Challenge Panels as deployed by some UK government departments such as BERR and consumer panels such as those created by agencies like Ofcom and Ofgem. The advantage of constituting such semi-formal fora is that transparency of early-phase policy development may be increased, while maintaining the potential for creative thinking, learning, collaborative problem-solving and debate that is more constrained at the stage of public consultation. In addition, so long as such groups are inclusive in nature, officials avoid the risk of capture by one set of interests or over-reliance on inputs from particular key stakeholders. Important caveats include monitoring the representativeness of any groups and also safeguarding against developing cronyism
- Create stakeholder networks. What might these look like? For models, one might look to the EPA in Ireland or the Department of Health in UK. It seems from our empirical research that the more people meet and the more this is facilitated, the greater the build-up of trust and the more likely it becomes that a move from competitive bargaining to substantive engagement with issues and common cause can be found – perhaps leading to learning and cognitive reframing
- In the same way, create /facilitate community networks, as the Victoria EPA has done in Australia. In such cases, the regulator becomes the facilitator (and sometimes the funder), but communities of those affected by/interested in regulation become active participants in debate and part of a collaborative approach to problem-solving and decision-making. This approach also addresses the need to consider fresh means of reaching the less well-resourced stakeholders. Monitoring the genuine representativeness of any groups thus formed is an important ongoing need.

- Develop consultation best practice – utilise new technology such as blogging and online network sites; use roadshows, workshops, community meetings; identify and tap into existing local level structures, forums and organisations
- Utilise relevant local media; do not rely merely on advertising in national papers calling for (written) submissions
- Create stakeholder mapping and organised structures for management of stakeholder relationships; share learning across whole-of-government; the UK’s Department of Health has developed interesting toolkits for optimal stakeholder engagement
- Support consumer/community groups to enable them to participate in processes (e.g. consider provision of funding to establish forums such as the Utilities Consumer Committee in Victoria)
- Consider Consultation Portals (e.g. Australian model for the business community). Ask stakeholders how they wish to communicate with the regulator/government and how they wish to receive feedback
- Adopt an active approach concerning co-design. Consult about more than merely narrow implementation. Think about building in continuous improvement. Involve regulated parties and other stakeholders (think about who they may be) in developing solutions to problems and/or ways of meeting overall objectives
- Pose questions – rather than just seeking comments
- Create more stages to the process – e.g. adopt Australian model of Issue Papers, Discussion Papers, draft research papers, draft findings, Green and White Papers
- Ensure all RIA documents are themselves consultation documents
- Ensure consultation periods are sufficiently long; but also ensure clarity around the scope for influence and do not consult widely on narrow, technical issues – ensure that all public consultation processes are meaningful

### **Oversight Measures**

Oversight measures involve scrutiny over processes of regulation typically with the objective of promoting better implementation.

- Redefine role of gatekeepers. Create better alignment between policy-owners and Better Regulation process gatekeepers. Reconsider the value of having Better Regulation gatekeepers in each central government department. Is the role too process-focused? Does this approach effectively ‘outsource’ Better Regulation?
- Identify ways to improve the debate over quality and merits of proposals versus merely checking for adequacy of formal RIA requirements. This might be achieved by the closer alignment of policy ownership and Better Regulation compliance responsibilities outlined above
- Centralise Better Regulation driver unit within Cabinet Office or equivalent – this both strengthens its authority across government and also immunises it from perceptions (and influence) vis-à-vis business/Treasury interests
- Encourage/facilitate independent external scrutiny and performance monitoring of both independent regulators and of Better Regulation implementation within government generally (model: Business Council of Australia’s scorecard system, VCEC’s annual reviews of regulatory reform and progress, National Audit Office role in the UK)
- Develop systems of ex-post review and evaluation. These may take a number of forms. As outlined earlier, more emphasis on outcomes was thought by some to help reorient Better

Regulation towards better quality regulation, while the Australian approach of routinely building in automatic review after a couple of years into every proposal also has much to commend it. Some officials have argued that review can be undermined as either Ministers or responsible civil servants may well have changed by the time review is due, yet the discipline of knowing any proposal will be reviewed for effectiveness should add further rigour to analysis of options in particular. The most stringent review requirement is that linked to a sunset clause under which a measure lapses completely unless re-legislated for. The gatekeeping function of Better Regulation officials or units should include thorough monitoring to ensure that all options are realistically and thoroughly engaged with, and assessed with equal rigour

- Consider the value of independent think tanks and/or oversight/review body, possibly modelled on both Australia's Productivity Commission and VCEC or NAO in Britain. It is argued that the Australian bodies, in particular, have greatly influenced and driven regulatory reform and added considerable learning in relation to various sectors and arenas. Their independence, innovation in consultation and engagement with a wide range of parties and the quality of research and analysis all add substantially to the drive for best practice regulation in that country

### **Information/Communication Measures**

The identification of information/communications measures highlights the impact of a good flow of information in shaping behaviour.

- Focus on transparency – publish as much as possible, as early as possible – the UK is a leader in this practice
- In particular, vis-à-vis transparency, consider ways of publishing the content and participants involved in early policy development phases, before the public consultation stage. There is clearly a need to shed greater light upon/open up this process, without losing the valuable opportunities for creative thinking, flexibility, reflexivity and innovation that this earlier phase offers
- Publish draft RIAs – consult on the numbers contained within
- Commission and publish research on the issue area that is to be the subject of possible regulation and on sectors from time to time. Such research needs to be independent and credible
- Develop/ensure adequate feedback mechanisms to consultees are in place
- As before, utilise approach of Issue Papers, Discussion documents, Green/White Papers (before undertaking RIA and certainly before options are finalised)

### **Reflexive Governance and Innovative Regulation**

- Re-assess performance of independent regulators and trends in areas like environmental protection or social partnership in Ireland. Is a drift occurring between their approach to Better Regulation versus that of central government departments? How can learning be shared?
- Instead of/as well as the many existing networks of Better Regulation or RIA officials (currently, most of these are gatekeeper-oriented), deliberately involve frontline policy

officials in regular shared learning sessions and create mechanisms for better communication of best practice (toolkits, consultation processes, thinking about collaborative governance)

- Political influence can be addressed through creation of bodies like Australia's Productivity Commission and through greater insistence on (earlier) transparency
- Rigorous monitoring of early-phase stakeholder engagement in policy development
- Substantial engagement with alternatives to regulation
- Better utilisation of, and engagement with, local and community networks and stakeholders
- Substantial engagement with, and openness to co-design (for models, see Ofcom in Britain and environment protection agencies)
- Innovation in stakeholder identification, mapping and ongoing engagement/relationship management
- Ensure stakeholder engagement is a permanent, ongoing, dynamic process
- Consider the value of structures like the Challenge Panels used by BERR in the UK
- Collaborative approaches with business – real co-design of solutions that work for enterprises
- Focus on continuous improvements, rather than compliance with minimum standards
- Substantial commitment to alternative approaches such as standard-setting, voluntary agreements and Codes of Practice – but with monitoring and review built in, under the shadow of more stringent action
- Review issues such as the brief of central departments compared with that of some regulators (consider what effect does a statutory consumer protection brief have on actual work and outputs?)
- Review cultural/ideological issues such as the balance between: administrative burdens and impacts; targets and communitywide benefit; focus on business/competition/competitiveness and communitywide impacts; simplification of burden reduction plans and outcomes; balance of quantitative and qualitative analysis in RIAs; Standard Cost Model (SCM) and variants thereof, including net benefit tools or multi-criteria assessment. All of this to be linked also to the role of Better Regulation units – are they process gatekeepers or an oversight level for quality regulation?
- Create authoritative and influential structures for independent research and external review of the entirety of regulation – scrutiny should not be confined only to RIA adequacy
- Address question of how Better Regulation systems and programmes can be better insulated from political expediency – if possible

# 1. Introduction

This paper has been prepared by a research team in the Law School, University College Dublin for the Reflexive Governance in the Public Interest programme under the European Commission's Sixth Framework Programme (<http://refgov.cpdr.ucl.ac.be/>). The research aims to explore and evaluate the nature, extent and effects of reflexive governance within Better Regulation regimes in Ireland, the UK and Australia.

## 1.1 Defining Reflexive Governance

The concept of reflexive governance in regulatory governance centres around the idea of the multiple parties involved in a regulatory regime having the opportunity to shape not only the targets and instruments associated with the regime, but also in some cases, the purposes and broad objectives. It embraces the practice of joint problem-solving between Government and stakeholders and, in particular, governance is said to be reflexive when the actors involved are learning from each other – to the extent that evidence of cognitive reframing can be identified (Lenoble and Maesschalck 2007). In this sense, we can distinguish reflexivity from traditional bargaining and stakeholder approaches such that the parties are enabled to *change* their thinking or position on certain issues, as distinct from simply accepting a compromise solution or outcome, that, even though it may take into account their interests, their actual preferences do not necessarily shift. In reflexive governance, preferences and interests can and do shift, principally as a result of shared learning through interaction.

## 1.2 Objectives of Research

Better Regulation regimes offer fertile ground for reflexivity, given the emphasis on stakeholder participation, especially through consultation. The scope and purpose of this research project was, therefore, to analyse existing principles and practices in the three countries studied to try to find evidence of shared learning and changing preferences and interests (cognitive reframing), and so to conclude whether Better Regulation's precepts can offer a template for the further development and enhancement of reflexive governance models. In our research we have looked for innovative aspects of regulatory governance, and in particular examples that go beyond the formulaic application of cost-benefit or regulatory impact analyses to better understand the processes through which such innovation occurs, and in particular whether it is linked to reflexive processes. In addition, we sought to identify the institutional conditions that might best foster reflexive governance, drawing on the experiences of Better Regulation practitioners, especially vis-à-vis consultation mechanisms and structures.

## 1.3 Defining Better Regulation

Better Regulation creates an architectural framework within which regulators and central government policymakers must operate when building or enforcing regimes that govern sectors or industries – or wider society.

Better Regulation identifies specific problems, the actors that should take care of these problems, the toolkit to use, the institutional design of who does what and when, and a set of rules to follow in order to achieve the aims' (Radaelli, 2007b, 2). Its core toolkit targets every stage in the

lifecycle of regulation from the formulation of rules or policy to their enforcement, and seeks the participation of non-State actors at every stage.

Better Regulation initiatives are grounded in an evidence-based approach to regulatory reform, while its techniques are characterised by awareness of the costs, benefits and risks of regulatory change. Advocates of Better Regulation want to change the way regulatory institutions do their business and ‘to provide a new social contract between government, regulatory authorities and interests’ (Radaelli and De Francesco, 2007, 5).

Ultimately, Better Regulation may be thought of as a form of meta-regulation – rules about rulemaking (Morgan, 2003; Scott, 2003a). Meta-regulation exemplifies the shift away from hierarchical command-and-control techniques and aims to bring greater flexibility into the regulatory process.

Although there is variation in its application between countries (and between the European Commission approach and Member States), better regulation programmes typically comprise some or all of the following elements:

- Programmes of legislative simplification (such as codification of existing legislation, review and repeal of older laws or regulation, modernisation and co-ordination of, in particular, company law, creation of quicker or simpler procedures for redress in commercial law cases etc)
- Methods of stakeholder involvement and consultation
- Use of ex-ante techniques such as Regulatory Impact Assessment (RIA) and cost–benefit analysis (CBA), applied to all primary and sometimes secondary legislative proposals as well as to independent regulatory agencies
- Assessment of alternatives to classic command-and-control regulation (including market-based mechanisms, self- and co-regulation)
- Codification of legislation
- Sunset clauses
- Adoption of risk-management tools
- Focus on reduction of administrative burdens

#### **1.4 Better Regulation and Reflexive Governance?**

Our research seeks to evaluate the extent, nature and effects of reflexive governance within Better Regulation regimes. In particular, we are focusing on the involvement of external stakeholders in the development of policy or regulation and identifying instances of joint problem-solving (and shared learning) between government and non-government actors.

In this context, reflexive governance is understood to encompass or display the following characteristics: institutional or other arenas such that deliberative problem-solving is facilitated; the participation of government and non-government actors (stakeholders) in such deliberative problem-solving and co-design of solutions to ‘common’ problems and third, the potential for both shared learning and, particularly, for reframing of actors’ interests and preferences as a *result* of interaction with other actors and joint problem-solving efforts.



New democratic arrangements may be emerging alongside the traditional dominant model of representative democracy. This new paradigm of a ‘consumer democracy’ empowers citizens to make informed choices, to obtain more client-friendly and cost-efficient services and to participate as a ‘co-designer in the way that services should be provided’ (Bekkers et al. 2007, 74), while government ‘can only meet the challenges of a more integrated, more responsive way of public service delivery if it functions like an efficient machine, which can be achieved by deregulation and reducing red tape’ (2007, 103).

In the representative model of democracy, emphasis traditionally lies on the input process via electoral and parliamentary mechanisms. With increasing separation of steering from rowing, democratic legitimacy can be perceived as weaker since elected politicians – Ministers or parliament in its traditional oversight role – have lost a degree of control over the services they are responsible for providing. In the ‘consumer democracy’, output legitimacy<sup>1</sup> (more effective policies, more likely to be complied with) is strengthened with enhanced delivery of appropriate public services. The informed participation of citizens/consumers (e.g. through consultation, focus groups, research) supplements input legitimacy. Better Regulation programmes can adhere to this model.

Putting citizens at the centre of the policymaking process (other than in their role as voters), and the involvement of stakeholders in agenda-setting echoes the Habermasian (1994) concept of deliberative democracy. The quality of the forums for deliberation is important – is the communicative power of citizens effectively channelled?

Citizens’ *participation* has traditionally been via the electoral process, democratic accountability classically constitutes the accountability of elected politicians to citizens through parliament and citizens’ *consent* derives from their authorisation of governments through elections. The proposition is that new dimensions of participation (via consultation, use of experts, citizen/consumer panels etc) and of consent (via new accountability mechanisms) are developing.

Whether new participative models substitute for, or complement, the traditional basis for democratic legitimacy, the inclusion of wider civil society representation can help prevent regulatory capture (e.g. by business interests) and help maintain a broader public interest focus to regulation and policy. However, studies of interest group politics<sup>2</sup> recognise that resources matter and that it is not easy to mobilise some groups (or individuals). Conversely, better-resourced stakeholders may find it more straightforward to dominate agenda-setting and deliberation. This observation was also made during our research by a number of interviewees.

Further, it has been noted by some commentators that there can be confusion in the interchangeable use of terms such as ‘stakeholder involvement’, ‘consultation’ and ‘participation’. As will be seen in this research paper, one of the criticisms sometimes encountered in Better Regulation is that consultation, in the sense of the formal, public process, which is required, may sometimes imply a process where consultees have little share or control over decision-making; where the major decisions may already have been made and where the exercise at worst amounts

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<sup>1</sup> Fritz Sharpf (1998) originally defined legitimacy in the sense of input legitimacy – or government by the people – and output legitimacy – government for the people (or effective outcomes).

<sup>2</sup> Space precludes delving into the debate on interest group politics. Key commentators include Schmitter (on corporatism), pluralism generally (Truman) and neopluralism (Walker).

to little more than box-ticking and at best, while comments received may well be taken into account and the process at least adds transparency, there is minimal scope to influence the core policy. On the other hand, stakeholder involvement or engagement is commonly entered into in earlier stages of policy development and it is in this activity that key stakeholders, at least, may indeed enjoy opportunity and scope to input into the policy development process. At the other end of the spectrum, some degree of participation can be seen especially in the environmental arena, where environmental protection agencies (see the Irish and Australian examples) seem to embrace the concept of co-design of solutions to problems that may involve local (affected) communities, regulated parties and the regulator. Participation might also be stretched to include the concept whereby a regulator sets out the objective but the means of delivering on this (implementation options) can be largely developed by the regulated party/ies. Again, this can be seen in the area of environmental protection; while other regulators such as Ofcom, Ofgem and Ofwat in the UK also claim to use such methods. The Australian use of self- and co-regulatory models could also fall into this category.

## 1.5 The Empirical Work

In conducting this project, we carried out a documentary analysis of better regulation processes and personal interviews with senior civil servants in Government Departments, with independent regulatory agencies and with key stakeholders such as employers' groups and trade union officials. 16 interviews were carried out in Ireland, 14 in the United Kingdom and 17 in Australia between November 2008 and February 2009.<sup>3</sup> The UK and Australia were originally selected for comparison because both have been amongst the leaders in development of better regulation programmes with reputations for innovation in regulatory reform, but in ways which are different from each other. At a later stage Ireland was added to the research in order to capture some of the issues associated with being a later adopter of regulatory reform ideas. The selection of three common law and English speaking countries with Westminster-type parliamentary systems of government has advantages in reducing distractions in terms of cultural differences and differences in terminology. The selection also creates obvious limitations in that the research speaks less directly to the potential limits to and capacity for reflexive governance in better regulation within the other governmental systems in the EU.

The approach has been to look at the Better Regulation regimes in the three jurisdictions. We examined the specificities of the culture and administrative history in each jurisdiction. In each of the cases, we looked at instruments, institutions and the prevailing philosophy and strategic focus of the Better Regulation architecture. Interviewees were asked to cite examples of innovation in regulation generally and in approaches to consultation. They were specifically asked to think about situations where changes to proposals resulted from stakeholder engagement or consultation and to consider situations where learning and changes of actors' preferences could be said to have occurred.

We have classified the elements of reflexive governance which we have identified as falling into the following categories:

- evaluation measures

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<sup>3</sup> Interviews were carried out by Ciara Brown alone. In addition to the interviews for this project, occasional reference is made to one or two interviews which she carried out as part of her graduate study in the summer of 2008.

- processes which focus chiefly on the evaluation of current or new rules against criteria such as costs imposed relative to expected or actual benefits
- dialogic measures
  - processes which engage stakeholders in exchanges over such issues as appropriate instruments, targets or objectives within a regime
- oversight measures;
  - processes which involve those who make or apply rules being subject to oversight or control by others, for example in a central government unit
- information/communication measures
  - processes through which sharing of information about a regime and other transparency measures create greater knowledge and engagement

We were interested also in measures which invoked competition or rivalry as a means to developing regulatory regimes (for example creating competition between self-regulatory regimes, or the use of scoreboards comparing the performance of different regimes) but did not find any examples at national level (though there are supranational examples).

## 2. Ireland

### 2.1 Culture and Administrative History

Since 1994, the Irish public service has been involved with a long-term programme of modernisation and regulatory reform. The twin aims of the regulatory reform programme are to ‘sustain national competitiveness and economic growth’ as well as ‘promoting inclusiveness and good government for all citizens’ (‘Regulating Better’ 2004, 1).

Ireland’s initial step was the Strategic Management Initiative (SMI) launched in 1996. It articulated regulatory reform in the context of simplification and the ‘growing need for clarity between the provision of a service and its regulation’, particularly ‘where there is potential for a conflict of roles in a changed environment of Civil Service regulation of the increasingly competitive provision of services’ such as utilities, which previously had been ‘delivered directly by the public sector without competition’. (‘Delivering Better Government’ 1996, 12). ‘Delivering Better Government’ recommended that regulatory reform should include elimination of unnecessary regulation, lowering the cost of regulatory compliance, improving the quality, rather than the quantity, of regulation and making regulations more accessible to the public, while protecting the public interest.

An SMI Working Group on Regulatory Reform was established. Its subsequent recommendations on consolidation and codification were published in 1999 as ‘Reducing Red Tape’. This was followed in 2000 with ‘Policy Proposals on the Governance and Accountability of the Regulatory Framework’ in the specific policy areas of transport, energy and communications.

The OECD’s Report on Ireland (2001) reviewed the progress made since the ‘Delivering Better Government’ report and pushed for further implementation of Better Regulation principles. The OECD concluded that ‘Ireland’s future strengths lie in continued attention to domestic competitiveness through regulatory efficiency and flexibility, good governance and competition policy’. Additionally at around the same time (2002), the P.A Consulting Group published an assessment of progress made under the SMI which found that ‘a shared understanding of what better regulation/regulatory reform entails does not exist across all Departments’. When asked about the origins of Better Regulation, one of our respondents<sup>4</sup> remarked that: ‘when we started on the public sector reform process in the ‘90s, we focused on making things more accessible to the citizen, on customer service and better delivery of services. You start with digitisation and e-government and longer opening hours, then you find yourself getting entangled in the quality of what you’re making more accessible and realise you need to reform the product, as well as the delivery.’

In 2002, in response to the OECD Report, a newly established Steering Group in the Department of An Taoiseach launched a consultation process ‘Towards Better Regulation’ that ultimately led to the White Paper ‘Regulating Better’ in 2004. The Taoiseach’s Foreword to this acknowledges a major impetus for Better Regulation saying: ‘increasingly, in all OECD countries, attention is

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<sup>4</sup> Senior official responsible for telecoms regulatory matters in the Department of Communications, the Marine & Natural Resources, interviewed earlier (July 2008) as part of postgraduate research on Better Regulation which preceded this project.

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being paid to choosing the most appropriate regulatory framework’, while also citing the commitment to Better Regulation at EU level, in the context of the Lisbon Strategy.

A Better Regulation Unit was established in the Department of An Taoiseach to drive forward implementation across the Civil Service. In 2002, a draft Regulatory Impact Assessment (RIA) model was developed and ‘Regulating Better’ contained a commitment to pilot this model. In 2004, five different government departments conducted this pilot.

The ‘Report on the Introduction of Regulatory Impact Assessment’ was published in 2005, accompanied by ‘Guidelines on Public Consultation for Public Sector Bodies’. The Irish RIA model requires that ‘impact on national competitiveness, economic markets, consumers and competition’ must be considered. Impact assessment ‘must identify and estimate costs of compliance and ensure that the burden of compliance is proportionate’.<sup>5</sup> It is interesting to compare the model’s focus with issues raised in the public consultation before the White Paper. One concern that emerged from that process queried the extent to which competition ought to be an ‘overriding criterion’ in regulatory decision-making and also asked ‘how to better balance economic objectives with important social goals’. The focus on ‘consumers’, rather than citizens was also criticised.<sup>6</sup>

The Better Regulation Unit within the Department of An Taoiseach recently reported on progress since the White Paper. Initiatives adopted under Better Regulation, and especially following consultations with business in recent years include:

- reform of land registration and a move to electronic conveyancing;
- consolidation and modernisation of financial services regulation;
- codification of Irish criminal law into one easily accessible penal code;
- creation of the Commercial Court to facilitate speedier resolution of commercial disputes (aimed at easing burdens for business);
- establishment of statutory consumer panels in regulated sectors.

The High Level Group on Business Regulation reported in 2008. Following the Business Regulation Survey conducted in 2007 by the Economic & Social Research Institute, the High Level Group made a number of recommendations for further ways of reducing burdens for business, specifically in relation to ways of eliminating duplication of information provision by businesses to government departments and agencies, as well as establishment of an appeals mechanism for parties affected by regulators’ decisions (High Level Group on Business Regulation 2008).

**Stakeholder Input Querying Existing Policy & Practice: High Level Better Regulation Group.** Several interviewees mentioned the early work of this group and commented on its effectiveness. In one instance cited, the Department of Health was summoned to appear before the group to explain its practice of only awarding new pharmacy licences where an applicant could demonstrate existing sufficient demand in the area. The Group felt this favoured the existing incumbent and argued that the department should not interfere if someone wanted to establish a

<sup>5</sup> Other developments on RIA since then include the provision of RIA training courses for officials, the establishment of a RIA network among officials and sector regulators to promote learning and skills transfer.

<sup>6</sup> [www.betterregulation.ie](http://www.betterregulation.ie).

new business. It was also feared that the granting of a DoH licence (effectively seen a mark of approval), would lead to ‘approved’ pharmacists adding on costs to customers. It is not clear that the early momentum of this Group has been maintained.  
(see High Level Better Regulation Group First Report 2008; available at [www.entemp.ie/publications](http://www.entemp.ie/publications))

## 2.2 Social Partnership

No discussion of regulatory reform or governance in Ireland would be complete without mention of the Social Partnership model which, over the past 20 years, has involved employers, trade unions and wider civil society representative groups in the framework agreements on pay and much else besides. The Social Partnership model has, in effect, given these stakeholders a strong voice in setting the national economic and social policy agenda. Although not strictly part of the Better Regulation agenda *per se*, and predating its development, the system is now part of Ireland’s institutional structures for policymaking. It may well be the case that any evidence of reflexive governance in the Irish case is to be found in the Social Partnership systems and practices, rather than under the Better Regulation umbrella. This is even more likely given that Better Regulation was introduced relatively recently in Ireland, whereas social partnership has been institutionalised for 20 years now. What follows therefore, is a necessary analysis of social partnership workings.

Social Partnership agreements extend across a broad range of policy issues. At their core has been the negotiation of pay deals for both the public and private sectors. However, a whole array of macroeconomic, labour, welfare and social policy issues are negotiated alongside the pay deals. From a theoretical perspective, social partnership has been conceptualised as a new mode of network governance (Hardiman 2006). It has been claimed that in Britain, policy networks can be rather static constellations of interests clustered around discrete policy areas; while in more corporatist states, the role of organised interests can be very structured. At EU level, networks may be more fluid, but still confined to specific issue areas and dominated by expert input. The Irish system differs from all this in that the interacting networks are not differentiated by policy area, but linked into a dynamic process of political deliberation and debate. The National Economic and Social Council (NESC) plays a pivotal role in coordinating the social partners and clearly sets the agenda for the successive rounds of negotiation with its regular reviews and Strategy documents. These effectively form the basis for each framework agreement, as a recent article by NESC’s Director clearly argues (O’Donnell, 2008).

The institutional construct for the social partnership model is important. The National Centre for Partnership, established in 1997 and later renamed the National Centre for Partnership and Performance, reflecting a broader mandate, was charged with encouraging employee involvement and promoting best work practice models while the National Economic and Social Forum, which focuses on wider social policy issues of exclusion, migration, anti-poverty studies etc were both intrinsic elements in the model. In 2003, these two organisations, together with NESC itself, were merged under the umbrella body of the National Economic and Social Development Organisation (NESDO). The other vital piece in the jigsaw is the Department of An Taoiseach (Prime Minister’s or Cabinet Office equivalent). The Department retains an overview of the entire process; coordinates the negotiations (quarterly meetings) and the Secretary General (also Secretary to the Government and head of the civil service) has chaired NESC for many years. Control over decisions as to what government defines as its core policy objectives relating back to its electoral



mandate remains vested in government and at the heart of the negotiating process. The Government remains the guardian of the partnership process and moreover, ‘shares some of its authority with the social partners’ (O’Donnell, 2008) and has even actively fostered the formation of interest groups where such has been thought necessary. Hardiman (2006) notes that the Irish situation is not quite tantamount to a ‘shadow of hierarchy’ as per Scharpf (1997), since pay deals are not concluded under even so much as an implicit threat of a statutory alternative – none exists. But it does place government in a central position to facilitate communication with the social partners and to exercise leverage.

Another key factor is the weakness of economic or ideological cleavage between the main political parties. The cross-class support base of major parties has contributed to the broad agreement across the political spectrum since 1987 that a consensus-seeking process actually yields the best outcomes. All parties and all governments since then have approved the social partnership system.

Social partnership grew out of interaction between employers, unions and government in the mid/late 1980s as they grappled with the problems of the enormous public debt, exceptionally high unemployment, severe emigration, ongoing industrial conflict and persistently high inflation. O’Donnell (2008) says that the economic strategy driven by social partnership allowed Ireland to escape from dependence on Britain’s political business cycle and to ‘reject the neoliberal approach to both social policy and regulation adhered in Britain between 1979-1997’. In his view, this development may have led to a higher level of social cohesion and solidarity in Ireland (especially between capital and labour), which then facilitated co-operation in addressing issues of structural change and reform in a non-conflictual way’.

What is most interesting is how the system not only survived Ireland’s return to prosperity (for which the early social partnership agreements are credited), but developed a multi-dimensional approach to policy issues and continued to be the centre of policy development throughout the boom years up to date. As Hardiman has also noted, one of the distinctive features of the Irish model is its inherent flexibility – the way that issues can be moved on or off the agenda, and up or down in terms of priority. As social partnership continued to mature, the state’s formal engagement with civil society also deepened (further aided by developments at the EU level). The processes of social partnership today provide a vehicle in which unions, employers and, since the late 1990s, the voluntary and community pillar can raise issues that concern them.

In Hardiman’s words: social partnership ‘offers government a flexible method of addressing emerging problems, testing possible policy responses and building support for subsequent legislative measures’. **It is in this sense that the structures and institutional framework of social partnership might offer the most potential for reflexive governance in Ireland.** Over time, social partnership has developed a dense network of working parties, committees and task forces, in addition to the more formalised procedures of monitoring and overseeing implementation of pay terms. At this point, several government departments operate more or less semi-permanent partnership forums to facilitate ongoing consultation on emerging issues (the Transport Forum is one obvious example). These various formal and informal forums provide an arena for ongoing dialogue. As one senior civil servant expressed it: ‘There is an open door into departments for the key stakeholders. We all know each other, mainly through social partnership operations. Whenever we’re thinking about something, I tend to just lift the phone and I’ll know in ten minutes what the attitudes are’. A senior trade unionist similarly commented: ‘I’ll get to hear

very quickly what issues are being discussed and will call to let them know our position and where the flexibility might be’.

Interviewees suggest that a large degree of trust has been built up over the years. It was perhaps inevitable in a small, open economy like Ireland’s, that strong relationships have developed. A deep understanding of each other’s positions and sensitivity to difficulties has been formed.

From a theoretical perspective, social partnership or social pacts are often claimed to belong to the school of neo-corporatism or competitive corporatism. O’Donnell (2008) challenges this view. According to him the actors in social partnership are both ‘maximising and reflexive’ and while the processes certainly rely on negotiation and a degree of bargaining, it also ‘involves the parties in...deliberation that has the potential to shape and reshape their understanding, identity and preferences’. Which, if true, certainly looks a lot like most definitions of reflexive governance. NESC has defined the partnership process as ‘characterised by a problem-solving approach designed to achieve consensus’.

According to O’Donnell, the characteristics of partners in classic corporatist states (monopoly representation and centralised structures) are giving way to new ones, with information as the key resource and a new emphasis on public advocacy, shared understanding and dialogue. At the same time, the role of the centre is shifting to give way to policy entrepreneurship, monitoring and facilitation of communication and joint action between disparate interests. If these can also be considered characteristic of reflexive governance, then we could argue that, in Ireland, it is social partnership which comes closest to meeting these criteria.

In addition, O’Donnell claims that viewing social partnership through the lens of employer/labour relationships is an incomplete analysis in the Irish case. As already suggested, the structural factors and pre-conditions previously thought to underpin neo-corporatism (such as peak associations and class-based political parties) did not exist in Ireland. The pattern of other European social pacts is not mirrored in the Irish case. Most of these evolved in response to urgent fiscal and economic crises. Ireland’s model had the same origins but what explains its continued survival at the heart of policymaking subsequent to the revival of the country’s economic fortunes where others dissolved once the original economic problems had been resolved, and, further, the expansion of the agenda beyond ostensibly purely economic matters?

O’Donnell (2008) also points out that competitive corporatism amounts to a ‘beggar-thy-neighbour’ approach. But Ireland’s partnership process has come to focus on more qualitative, quality-of-life issues, which suggests a greater involvement in the building of a society, rather than solely an economy. Work/life balance and climate change are cited as just two examples of complex issue areas being managed by new forms of governance oriented towards problem-solving.

Gradually, the successive national agreements have come to include major statements and commitments on virtually every aspect of economic and social policy. Union recognition, employment standards, labour inspection and protection, pensions review, care of the elderly, childcare, the provision of social housing, waste management, strategies to tackle alcohol and drug abuse, primary medical care and dealing with the ‘information society’ are just some of the myriad of issues which have been the subject of initiatives specified in Partnership Agreements. The

potential for shaping the agenda of policy debate and for influencing government thinking on the part of the social partners is tremendous.

‘Social concertation’ has been coined as a term to describe the ‘engagement of actors in a process of deliberation that has the potential to shape and reshape both their identity and preferences’ (EU High Level Group on Industrial Relations). In such a system, participants are supposed to ‘consider more alternatives to policy options and deliberate on a wider range of issues. They may redefine the content of their own self-interest’ (European Commission, 2002:27). The deliberative governance model (as outlined by Marginson & Sisson, 2004:130) may well describe what happens in countries like Ireland (also Denmark and the Netherlands, according to these authors), where there is a long-standing and widespread social concertation. In states where such engagement is more recent, or diffuse, and/or where there is a lack of trust, the dialogue may descend to ‘political exchange’ (Marginson & Sisson, 2004) – or perhaps little more than straight bargaining.

According to O’Donnell, social partnership in Ireland has produced not only new forms of action (in addition to pure bargaining), but also new arenas for deliberative and problem-solving (working groups, local area partnerships). These are acknowledged as incomplete, but they may offer a case of negotiated public governance.

**Changing Preferences via Social Partnership: Employment Law Compliance Bill (2008).** This Bill is still in consultation with IBEC, ICTU and CIF etc, at the time of writing. The Department of Enterprise, Trade & Employment refers to the row over Irish Ferries and GAMA in recent years (the use of non-national workers to lower wage costs and abuse of non-national workers’ rights respectively) as the catalyst which drove a new engagement with employment rights that has involved the social partners. The Irish Ferries row erupted as the negotiations on Towards 2016 were about to start and delayed the formal talks. During this time, ‘pre-negotiation’ discussions were held with the social partners. ‘Towards 2016’, when finalised, committed the government to the publication of the Employment Rights Bill, which would establish a new inspection agency (NERA - National Employment Rights Agency) and significantly increase the number of labour inspectors. NERA itself was ‘born out of working groups’. Considerable work on the issue of employment rights protection and compliance involving the social partners had been undertaken by the Department, but ‘GAMA and Irish Ferries galvanised us into action and the issue was fed up into the social partnership process and given urgency’, according to a Department official. This official also remarked that stakeholder concerns are not the only influence on government action – ‘we are also the victim of management by Morning Ireland!’, a reference to an influential radio news programme. In a further example of co-design in relation to employment rights, this official described the Irish situation in relation to recognition of trade unions. There is no obligation on an employer in Ireland to negotiate with a trade union (individuals have the right to join). The main reason this situation exists is because of the presence of so many US multinationals in Ireland and their importance to the economy and their opposition to any change. A High Level Working Group, comprising employers, unions and government representatives was set up under Partnership 2000 to look at the issue of the resolution of disputes where negotiation arrangements are not in place and collective bargaining does not exist. The Group recommended a set of voluntary procedures to be incorporated into a Voluntary Code of Practice, and an amendment to the 1946 Industrial Relations Act which would provide new powers to the Labour Court to issue binding determinations governing pay and conditions in firms where there is an absence of collective bargaining. Ryanair (another opponent of wider trade union recognition rights) appealed

a case successfully to the Supreme Court; the Court found in favour of Ryanair and asked the labour Court to reconsider the case in the light of the rulings it made. As a result, unions effectively stopped taking cases under the legislation. The impasse had to be addressed and a commitment to do so is contained within Towards 2016. A consultation process is due to commence soon to reach an agreed outcome. The Department of Enterprise, Trade & Employment used this story to illustrate ongoing dialogue and co-design of solutions to a problem, involving all interested parties alongside government. Once again, it is clear that the discussions were conducted via the structures of social partnership; these structures facilitating the reflexivity involved.

The partnership working committees also function as the principal conduit for the government's obligation to engage in consultation and 'social dialogue' that arises from membership of the EU, UN and other organisations. For example, these committees have been utilised to deliver overlapping consultative and reporting requirements demanded by the Open Method of Coordination (OMC) in EU policy processes. The existence of these ready-made forums through which to engage in consultation have the benefit of keeping a focus on joined-up government and maintaining a whole-of-government perspective on major issues (Hardiman 2006).

#### **Reflexivity? Active Stakeholder Participation in Co-design: Transposition of EU Directives.**

The processes involved in transposing EU law were mentioned several times in interviews as offering examples of stakeholder engagement and of reflexivity in the Irish context. There is flexibility around the means by which national governments decide to achieve the objectives laid down at EU level through directives. In the Irish case, the government frequently uses this opportunity to engage stakeholders and obtain their input on the optimal strategies. Often, a voluntary approach to compliance with new regulations is tried. Examples cited included the treatment of agency workers in relation to Part time and Fixed Contract directives. (e.g. Protection of Employees (Part Time )Work act 2001 and Fixed Term Work Act 2003, implementing Directive 97/81EC). A long consultation process (with the social partners) was embarked on in Ireland, which resulted in the concerns of certain temporary agency workers (such as musicians) being taken into account in the final legislative format. A senior civil servant in the Department of Enterprise, Trade & Employment contrasted Ireland's success with this transposition to the UK experience, where, according to this official, the process 'got stuck in Parliament after five years', largely due, he felt, to a failure to consult early enough.

Despite the pivotal role of the voluntary and community pillar in the social partnership context, it has been argued by some respondents that Government Departments are too focused on business interests, meaning that, for them, Better Regulation may yet come down to a narrow interpretation, revolving around Regulatory Impact Analysis (RIA) only and the reduction of burdens on business. It is claimed that the independent regulators, in fact, often demonstrate an apparently stronger consumer/citizen focus. Some indeed have a specific consumer protection mandate. This development, if true, would mirror views in the UK, which assert that the original nuanced rhetoric of Better Regulation has been lost and that its agenda has been 'hijacked' over time by business interests. Ireland, since it is still in the relatively early days of implementing the Better Regulation agenda and because of its unique culture and institutional frameworks for consultation, could develop a wider role for Better Regulation. But it does appear to be facing choices.

## **2.3 Evaluation Measures**

The Better Regulation agenda is slowly becoming institutionalised in the Irish context, particularly in relation to RIAs, but arguably still lags Britain both in its embeddedness within government departments and the sophistication of the methodologies applied. Anecdotal evidence<sup>7</sup> suggests that there may still be a tendency to ‘tick boxes’, rather than really engage with stakeholders, and that there is a risk that RIA is used to justify previous policy decisions rather than consider alternatives, while both monitoring and ex-post review/publicity fall short of the UK standards. As a senior official in one central Department put it; ‘ We often resort to using a Screening RIA to avoid the protracted and complex consultation issues’ (Screening RIAs are an abbreviated analysis of the market and background to the proposed regulatory action and for one reason or another, find that expected impacts are insufficient to warrant a full, in-depth impact assessment to be undertaken. While this might seem appropriate in circumstances where a proposal has genuinely a narrow scope and a limited audience, interviews (and the 2008 Review of Regulatory Impact Assessment) indicate that the tool has perhaps been used inappropriately.)

New guidelines on RIA are now due, following the Government’s acceptance of the recommendations contained in the 2008 Review of Regulatory Impact Assessment, including, significantly, its recommendation to abandon screening RIAs. This may, therefore, lead to some mitigation of the problems identified above.

Accountability is another related factor. Given that policymakers ought to be made to explain and justify their choices, a requirement for ex-post reviews as well as the publication of all RIAs (as in the UK) might help in this regard. Ex post review could be institutionalised as in Australia, where automatic review provisions (including sunset clauses) are built into regulatory and legislative instruments. Who should conduct the review though? The need for expertise and understanding of the issues might point towards peer reviews as optimal, as one interviewee suggested.<sup>8</sup> A review process would evaluate whether the option chosen had, in fact, delivered on original objectives and achieved the stated outcome envisaged, while also considering whether the instrument and approach followed were the most appropriate for the purpose. Such review typically also considers the ongoing value or need for the regulation in question, its removal being mandated unless a robust case is made and accepted for its continuance.

A weakness in the implementation of many Better Regulation programmes is lack of transparency. In Ireland, government departments merely have to cite the number of RIAs carried out in their Annual Reports and do not have to provide information on what effect impact assessments have actually had in influencing decisions. It is very difficult in the Irish context to follow the trail to identify what (if any) changes have occurred on the path to publication of legislation. Much more detail on how the inputs of consultation may have affected the policy decisions and on what (if any) alternatives were considered would greatly enhance the credibility of the ultimate policy choices. Without such transparency, there is a high risk of RIAs being used to justify a pre-existing preferred option (or perceived to do so). The existence of an independent oversight body with reporting requirements has been recommended. However, as noted above, oversight also carries with it the problem of a lack of in-depth expertise in all issue areas.

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<sup>7</sup> Interview with IBEC, July 2008 and see also Review on Regulatory Impact Assessment for Dept of An Taoiseach, published July 2008, [www.betterregulation.ie](http://www.betterregulation.ie).

<sup>8</sup> Official with Department of Communications, Marine & Natural Resources.



The need to demonstrate that alternatives are considered might be addressed by engaging in in-depth cost benefit analysis and more comprehensive approaches to risk assessment and monetisation. One interviewee commented that the discipline of RIA – the enforced attention to costs – alone made the development of Better Regulation practices worthwhile as Civil Service planning had previously tended too much to qualitative assessment only.

That said, an integrated approach is required.<sup>9</sup> CBA may also be capable of stifling better *quality* outcomes – a point raised also by some UK commentators. Solutions must be found to optimise consideration of wider social and environmental impacts, and not only economic ones, if Better Regulation is to build its inherent potential to deliver better quality outcomes. This point seems to have been taken up by the OECD and was a theme at the Bertelsmann Stiftung International Regulatory Reform Conference in November 2008, where increasing interest in multi-criteria impact assessment was noted by some Better Regulation practitioners and academic respondents who had attended it.

Senior officials in another central Government Department suggested that RIA, as practiced in Ireland anyway, is something of an adversarial system. They see it as removing some of the flexibility inherent in policy development. In particular, they felt that a ‘one size fits all’, process-driven approach can become a monolith and that an iterative approach (as what is deemed achievable changes over time) can yield better results. ‘There should be the flexibility to adapt RIA to suit different circumstances’. The Department cited two examples (registration of small intermediaries where there was no public effect or consequence and regulation of solar panels) where short, limited consultation with key actors, rapid feedback and swift implementation of regulations took place (see examples at [www.environ.ie/en/publications/consultationdocuments](http://www.environ.ie/en/publications/consultationdocuments)). This would be more difficult to do in the UK, where ‘there is a much more prescriptive and time-consuming consultation system’. (However, these officials may not have been familiar with the latest Code on Consultation in the UK, which suggest that public consultation should only be used where there is scope to influence outcomes). According to them, a number of departments believe that the central Better Regulation Unit’s focus on the theory and process of RIA mitigates against its value. ‘Too often, the ‘I’ part of RIA gets forgotten about. It really ought to be about impact on punters, and it’s more often than not, reduced to a numbers game - an economist’s delight’.

Social partnership structures and forums may be seen by some civil servants as a conduit for consultations required by Better Regulation principles and especially for impact assessment. The readiness of some civil servants to deploy social partnership structures in this way and –further- to tap into existing relationships with stakeholders – may risk substitution for real Better Regulation-oriented consultation. In reality, what seems to happen is that proposals are worked up informally through these forums and then either only a screening RIA is opted for (to date, bearing in mind that screening RIAs may now go, following the 2008 review), or the ensuing consultation does not probe alternative measures thoroughly, principally because ‘the key stakeholders will probably have been involved from the outset in developing the ideas, and certainly, there will be no surprises for them contained in our proposals’, according to one senior civil servant. He also added that informal, partnership-based (not RIA) consultations meant he ‘knew how far I could go’ when planning proposed legislation such as that to establish the Dublin Transport Authority. (Dublin

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<sup>9</sup> In April 2008, the Irish Times stated that the Minister for Health’s decision on whether to introduce a national cancer vaccine awaited three reports – two from independent medical bodies and a *separate* CBA from the HIQA. We may question the validity of separating CBA from expert input.



Transport Authority Act 2008) ). The same civil servant also confessed to using screening RIAs to ‘get out of the rigour of asking 40 questions, which are far too many’. However, the discipline of cost/benefit analysis integral to RIA was thought to represent important progress in the approach to project evaluation (which has recently had something of a chequered history in Ireland with some notable cost overruns and controversial abandonment of major projects found later to be unworkable or too costly).

Staff in the Better Regulation Unit in the Department of An Taoiseach believe that implementation of Better Regulation in Ireland has unique aspects. First, the link to the public service modernisation agenda which is about delivering better government generally (the unit responsible for which is housed in the same department and shares a head with the Better Regulation Unit) means better integration of these two agendas than in other jurisdictions. In addition, officials argue strongly that the Irish model is working towards a multi-criteria model, in that a) civil servants have tended to carry out extensive qualitative assessment – ‘the British system where a Minister signs off on a proposal if the benefits outweigh the costs simply wouldn’t work in Ireland’; and b) that the Irish civil service has a deeply-ingrained commitment to public service. This means that ‘we are good at doing *balanced* regulation. We know that those who shout loudest should not be allowed to dominate the conversation’.

This view contrasts with those expressed by some outsiders. An official with one agency, for example, believes that the overall approach to stakeholder consultation by Departments such as Enterprise, Trade & Employment have led to capture of civil servants by business interests. Meanwhile, an official in that department expressed concern that Better Regulation in Ireland may tend to overlay focus on e-government solutions rather than deeper structural reforms. This official, however, made an important point that RIA has been ‘revolutionary’ in its demand for ex-ante appraisal of costs, not only to business or citizens, but also to the public sector. (For example, the costs of implementation of proposed legislation). Although not widely deployed yet, this rich potential of RIA was singled out as most important. He further suggested that application of the Standard Cost Model (SCM)<sup>10</sup> could deliver important structural reform in the Irish public service, where the clear or realistic view of projects following RIA must lead to better quality political decision-making. It was noted that the Netherlands, Belgium and the UK are all much further advanced than Ireland in implementing Better Regulation, having had more time to study its impact and to tweak the system. Key enhancements suggested were the need for more, and earlier publication of material and also the probable need to introduce ex-post evaluation of impacts (this latter point was also acknowledged by the Better Regulation Unit).

In a critique of the operation of social partnership, one Regulator felt strongly that the culture of consensus and compromise has exacerbated a deal-making focus within the civil service itself, having a negative impact on the quality of critical analysis undertaken by departments. An advocate of cost/benefit analysis, he argues that ‘no real RIA is happening’; that both the discipline and the expertise in economic analysis are lacking in the Irish civil service. He contrasts this situation with that of the British Ministry of Transport which operates a five-tier banding for cost benefit analysis of projects. If a proposal does not meet the criteria of either of the top two bands, it cannot even be advanced to the Minister. And, as this Regulator argued, robust defence of

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<sup>10</sup> The SCM model is a framework for determining the administrative burdens on business and provides a quantitative methodology for doing so. The model was espoused by the OECD and its use is widespread – the UK, the Netherlands and the Government of Victoria just a few of its many early adherents. The EU uses a modified SCM methodology.

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any case for intangible social benefits to overcome cost is only credible if the calibre of the basic analysis is sound.

## 2.4 Dialogic Measures

In this section we consider the extent and various methods deployed to engage non-government actors, regulated parties and other stakeholders potentially affected by a proposed policy. Such ‘conversations’ include the formal public consultations required under RIA protocols, as well as the broader and more informal discussions that take place in the earlier phases of proposal development, and finally the ongoing dialogue that is undertaken within the structures of social partnership. In the context of Better Regulation regimes, dialogue usually means the formal consultations but officials acknowledge that the greatest potential for reflexivity is more likely to be found in the more informal structures and forums.

Consultation processes raise several questions. Who is consulted? How is the selection made? Suggestions for ‘ideal’ engagement with stakeholders have included citizen juries and permanent panels of representatives of business and civil society. Independent agencies in Ireland engage with such panels, but it is not traditional practice for central government departments. *‘What tends to happen in practice is that the ordinary citizen is not resourced to engage in consultation with us. It tends to be industry – the operators and business representative organisations who always respond to calls for consultation and that does mean a skewed input.’*<sup>11</sup>

Irish Government departments may also perhaps be criticised for their public consultation methodology. Advertising in the *Irish Times* with a call for written submissions (the default method) does not reach all citizens who may be affected by a proposed measure. The wider use of more imaginative consultation mechanisms is not yet embedded in the system. This situation can be contrasted with that in the UK, which has successfully experimented with many of these over the years. British consultation processes have even been subjected to – and rejected – by judicial review. Systematic identification and consultation with interested parties at a much earlier stage of the process (i.e. before a proposal is released for public consultation) is advocated.<sup>12</sup>

Some civil servants make an important distinction between consultation undertaken for RIA purposes and that undertaken either as part of social partnership, or more generally for policy development and problem-solving. They criticise the limitations and prescriptive nature of RIA consultation demands, while believing in the value of the more informal mechanisms. They also point out that public consultation often produces skewed responses as ‘people who come to public meetings usually have an issue or an agenda – you need people to engage in the spirit and terms of the consultation, not resort to sound-biting’. In that context, and as these officials recognise, the greatest value of consultation lies in situations where ‘we know there’s a problem, but the method of solution is not entirely clear’. However, there is a view that engagement with industry actors is really the most important element. This largely happens out of sight and before formal or public processes (which officials often then find somewhat frustrating or time-consuming).

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<sup>11</sup> Interview with official in Irish Department of Communications, Marine & Natural Resources (July 2008).

<sup>12</sup> On July 22 2008, the FT highlighted the political row ensuing in Britain over abandonment of many Budget provisions, following extensive consultation. Some argue that this means that government is actually listening to input, but others are critical, claiming that consultation ought to have been undertaken much earlier.

The 2004 international study on RIA best practice recommended that particular attention be paid to ‘weaker’ or ‘non-organised’ stakeholders, going so far as to advocate direct approaches in such cases. The Irish public consultation exercise that preceded the White Paper also suggested that ‘weak’ stakeholders be resourced to respond to calls for submissions to enable them to participate fully in all relevant consultation processes.<sup>13</sup> However, as one senior official put it ‘it can be hard to get a conduit to the silent majority. Moreover, if they don’t respond to your calls for views, do you take it that they are uninterested or unaffected? How do you measure the impact of responses – and of non-responses?’

That said, the Irish guidelines on consultation (outlined in the 2006 document *Reaching Out*) which suggest a number of key questions that civil servants ought to ask themselves, before embarking on any consultation, have been cited in Britain as a good model for civil servants and the latest (November 2008) Code of Practice on Consultation mirrors some of the Irish approach.

**Exemplary Consultation? Consultation on the Regulation of the Waste Management Sector (2006) (at [www.environ.ie](http://www.environ.ie))** The Department of the Environment cites this as a ‘very genuine consultation’. The initial consultation paper posed a series of questions across a spectrum of options, including the do-nothing option. The Department’s objective had been to ‘build a consensus’. The difficulty to be addressed was that the public sector (in the shape of local authorities) was both a provider of waste collection services – often in competition with newly-emerging private sector operators – and yet, the local authorities also regulated the entire sector. The Department felt this situation could not continue and this was reinforced by the 2008 OECD study of the Irish public service, which specifically referred to these issues in regulation of the waste sector. The Department also had another objective which was to streamline the process involved in licensing of small scale treatment facilities and waste operators. Up to this point, an operator could only obtain a regional licence; the Department wanted to change the rules so that once a licence was obtained, it would have national effect (designed to promote development of the market and competition). The initial consultation paper issued was ‘neutral and descriptive in nature’. The non-judgemental series of questions it posed were designed to elicit a range of responses. The Department’s view was, and remains, that an unstructured consultation can result in ‘emotive rants’, whereas if what is put into the public domain for debate is factual and evidence-based, ‘you invite comments on how we might best address any deficiencies in the operation of the market, whereas if you just ask: What are we going to do about this? you invite polemics’. An evidence-based approach ‘allows us to be more demanding of the more organised or more important stakeholders (i.e. industry players), that they, too, should take an evidence-based approach in their responses.’

It was stated above that the Better Regulation agenda is still only becoming embedded in many government departments and, as the 2008 Review concluded, teething problems are still being addressed (a point also echoed by several interviewees). However, the Irish situation offers some unique facets. There is a long tradition of public consultation on major policy proposals and, most importantly, the 20 year old Social Partnership model has further strengthened this culture to the extent that ‘it is almost a knee-jerk reaction for us to test the waters with key stakeholders whenever we are thinking about issues’, in the words of one interviewee. To that extent, the Better

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<sup>13</sup> One Irish official interviewed suggested that practical considerations can make this difficult but that the existing Social Partnership structures (which include representatives of wider civil society) might be utilised in order that the policymaking process ensures an adequate and more inclusive representation of interests.

Regulation practices in relation to impact assessment consultation almost overlays a deeply embedded existing system. There is some risk of overlap and of consultation fatigue. The explanation for RIA being treated somewhat as a box-ticking exercise may in part be attributed to civil servants' belief that they already know what stakeholders think, due to existing, ongoing dialogues. An official in the Better Regulation Unit in the Department of the Taoiseach said that, when advising other Departments that a RIA will be necessary on a particular proposal, they find that consultation may already be underway, as this is embedded in civil servants' thinking anyway.

**Innovative Consultation, Co-design of Solutions: The Consumer Protection Code of the Financial Regulator.** The consultation process involved in the establishment of the Code in July 2006 ([www.financialregulator.ie](http://www.financialregulator.ie)) was one of the more extensive and innovative undertaken. Following its establishment in 2003, with a strong consumer protection mandate, the Financial Regulator wished to create a single Code that covered all retail financial services provision. Previously, different sectors (banking, insurance, mortgage broking, moneylending) had operated under different (and sometimes in the absence of) Codes. The first step was to issue interim codes for those who had none, setting out general principles. The second step was to determine who were the stakeholders with whom the regulator needed to engage in consultation. This identification process was exhaustive. Three consultation papers were produced (CP2 Review of the Conduct of Business Rules for Financial Services Providers, CP3 Review of the Marketing and sale of trackers and CP10 Consultation Paper on the Consumer Protection Code - see [www.financialregulator.ie](http://www.financialregulator.ie)). The first of these, however, was entirely non-prescriptive. It asked a series of questions as to what the format of any new Code might look like. The Regulator initiated a media campaign around this paper to raise awareness and encourage widespread response. The Regulator's only stipulations were that it had decided to be a principles-led, not rules-led body and also that the Code should be product-led, not sector led (the same criteria applying to a mortgage or insurance product, for example, regardless of the institution where the consumer sources it). When the actual Code was finally published in draft form in February 2005, the Regulator had sought to identify work going on elsewhere in areas covered by the Code – from social networking groups to the Law Reform Commission which had been working in the field of Law and the Elderly. (It is noteworthy that the Better Regulation guidelines were only produced by government in the middle of the consultation, and so the actual RIA performed was the first one undertaken under the new guidelines). A document summarising the public response to the draft Code (known as CP10), was also published. The Regulator took on board several comments arising from the public consultation, including reworking the definition of 'private customer' and other clarifications and tightening the drafting. Today, the Regulator's inspection teams monitor implementation of the Code (using a variety of mechanisms from inspections to mystery shopping and consumer helplines). According to officials, in the approach to enforcement the first step is always to explain. The content and purpose of the Code is always explained to regulated entities. Clarifications are issued where necessary and feedback from themed inspections is provided. Experience to date shows industry very willing to proactively seek guidance on interpretation. In the case of transgressions that may cause serious consumer detriment, the sanctions process is initiated. Since the Regulator seeks to publish the outcome of sanctions, it finds that almost all problems are resolved at the first level of the sanctions process – i.e. settlement, without necessitating a full hearing. It may be that the Code works principally because the long process of debate leading to its introduction caused institutions to reframe their thinking. Without actually losing sight of their own competitive positioning and self-interest, a redefinition of the basis of competition developed – in other words, compliance with an industry-wide, non-sectoral Code would allow them to compete on quality of customer service. In 2009, the regulator will

implement a review of its operation, primarily asking industry and consumers to identify issues that have arisen during the operation of the Code and how these might best be resolved for the benefit of the consumer. The Regulator liaises with two permanent statutory consultative panels – Consumer and Industry, which are appointed by the Minister of Finance for three-year terms. Both Panels meet once a month. Any policy or regulatory document (see s57DF of the Central Bank Act 1942) automatically goes to these panels for consideration and comment and the officials are often requested to present to them. The Financial Regulator may decline to give effect to any particular advice provided by the panels (s57Df of the Central Bank Act 1942). In addition to their shared functions of commenting on the Financial Regulator’s draft estimates of income and expenditure and consultation on these estimates with the Minister, as well as commenting on policy or regulatory documents, the panels are each also charged with specific functions, including - in the case of the Industry Panel, commenting on the impact on competitiveness of the Financial Regulator’s imposition of restrictions/conditions and commenting on the impact of changing trends on the Financial Regulator’s functions and responsibilities; and - in the case of the Consumer Panel, commenting on the performance of the Financial Regulator and providing it with comments on the performance of the financial services industry.

A senior civil servant in the Department of Transport spoke about the need to ‘shorten the chain’ between policymakers and end-users of services and argued that extensive dialogue at an informal level takes place in most departments with key stakeholders. He mentioned asking a county manager to map his entire county’s transport needs, which were then put to the forum where the availability of different modes (from school buses out of hours to existing Bus Eireann bus schedules) could be manipulated to help answer those needs, without necessitating the introduction (and financing) of entirely new services. This example of joined-up, cross-departmental problem-solving, alongside stakeholders and market participants was cited as relatively typical.

**Changes as a Result of External Input: The Department of Justice, Equality & Law Reform** recounted an anecdote about its plans to renovate, restore and rebuild Mountjoy Prison (widely held to be decrepit but something of a sacred cow, given its historical connection to the foundation of the State). Business experts, in their capacity as members of the Prisons Advisory Board however, concluded that redevelopment/modernisation at the existing site made no financial sense and that the proper course would be to dispose of the property and build a modern prison on a green-field site. Despite initial horror, the department eventually accepted the rationale of the argument and this is now the official policy being pursued. Departmental officials freely admit the alternative option would never have occurred to them, without the benefit of external, objective and expert input.

In an interesting comment on stakeholder identification generally, a senior official in the Department of Justice, Equality and Law reform remarked that, in addition to being careful about distinguishing between lobby groups and stakeholders, it was also sometimes the case that stratification in large organisations (such as representative organisations) meant that informal contacts outside the formal structures can get lost and messages may not always be accurate. Government officials sometimes find themselves ‘being led by the nose by a small number of articulate people in Dublin, or at the top of the organisation with their own agenda’. He cited the recent case of the establishment of the Garda Reserve. Apparently, Garda union leadership swore that their members would never work with volunteers. The department made it a condition of ‘Towards 2016’ pay talks that the leadership carry out a poll of their members. They voted ‘overwhelmingly’ in favour of establishing the Reserve.



**Alternatives to Regulation (a): Tackling the problem of chewing gum litter.** Several Ministers over time have called for a levy to be imposed on chewing gum manufacturers (principally a single company). The industry fiercely resisted this and came up with elaborate alternative proposals. It put considerable funding into anti-litter advertising campaigns and also promised to undertake research into the viability of producing a biodegradable gum. The government agreed to a three year monitored period to see if these initiatives would work. According to the Department of the Environment, research so far it has commissioned shows little evidence of an improvement and so the levy issue ‘may have to be revived’.

**Alternatives to Regulation (b): Tackling Litter from ATM Receipts.** In a comparable story, but one with a different outcome, the Department of the Environment cites the case of the banking industry. Also faced with regulation to address the widespread problem of litter at ATM machines, they offered to invest further in technology which would ask customers whether or not they required a receipt, rather than automatically printing one for every ATM transaction. This solution seems to have worked and the litter problem ameliorated to government’s satisfaction.

## 2.5 Oversight Measures

One Regulator strongly criticised the privacy attaching to social partnership discussions and consultation, believing that not only was transparency thus sacrificed, but also that democratic legitimacy might be undermined, as the role of the Oireachtas (parliament) in debating and determining policy has been effectively overtaken in Ireland by the process of social partnership.

A senior official with one Regulator pointed up key differences between standards of publication between the UK and Ireland. Having just completed extensive consultations with the industry he regulates and compiled some (possibly controversial) recommendations, he was at the time of interview grappling with the duty of reporting to the Minister versus immediately publicising the outcomes of the process on the Regulator’s website. In contrast, he suggested that while several separate reviews of the same industry are currently underway in the UK (too many, even, being carried out by different regulatory bodies, highlighting a different criticism about the risk of consultation fatigue as well as disjointed outcomes), material is being put into the public domain ‘every step of the way’. As the official commented, the extensive and detailed nature of consultation means that ‘nothing risks being overlooked’ and that the decision-making process is commendably transparent, but at the price of slowness. Yet, conversely, a senior EPA official suggests that the British approach to consultation may be too prescriptive and narrows the focus of comments unduly.

**Stakeholder Monitoring: National Disability Strategy and Disability Act 2005.** Disability stakeholders have provided an input into the process of formulating disability regulation and legislation since the Government initiated a consultation process on the Disability Bill in 2002. This culminated in the launch of the National Disability strategy in September 2004 (see [www.justice.ie](http://www.justice.ie)), the enactment of the Disability Act in 2005 (for which, however, no RIA was undertaken, interestingly) and subsequently, the launch of sectoral plans in July 2006. The role of



the social partnership process in all this is evident. Towards 2016 (the latest partnership agreement) contains several commitments in relation to monitoring progress on the implementation of the strategy, including a commitment to prepare progress reports on the sectoral plans after three years and a review of the 2005 Act after five years. Towards 2016 provided a base to formalise the relationship between government and disability stakeholders with its further commitment to establish the National Disability Stakeholder Monitoring Group (NDSSMG). This seems to be quite an innovative move to institutionalise stakeholder monitoring of a government action (in this case, legislation). The NDSSMG membership is composed of a Senior Officials Group on Disability with representatives from the six government departments responsible for implementing the sectoral plans, as well as the Departments of the Taoiseach, Finance, Education & Science and of Justice, Equality & Law Reform, together with the Disability Stakeholder Group which comprises six representative disability groups, the National Disability Authority, IBEC and ICTU. The NDSSMG is committed to meeting bi-annually in Towards 2016. In addition, the six implementing (sectoral plan) Departments have established their own ongoing consultative fora and the Disability Stakeholder Group participates in each of these.

Anecdotally, interviews with NESC highlight some of the debate between the social partners that surrounded the Disability Act. NESC itself (and disability stakeholders) argued for a rights-based approach and a focus on continuing improvements, not merely conformity with minimum standards.

In recent times, as the Irish economy has deteriorated sharply, some of the criticism of social partnership as it has now come to be practised which we heard during our interviews, has also come to light in public debate and especially media commentary. On more than one occasion recently, various members of the government have been heard to warn that ‘it is government that governs’. The perceived need to consult with the social partners – and to get their agreement – before implementing any radical fiscal surgery (e.g. public sector paycuts, introduction of new taxes) has been the target of much of this criticism. One civil servant pointed to the fact that ‘other countries have no difficulty with government making brave or swift decisions, but here everything has to be done in negotiation with the social partners, which is creating a unique difficulty nowadays’.

**When Government Dictates: The Plastic Bag Levy.** (SI no 605/2001 –Waste Management (Environmental Levy (Plastic Bag) Regulations, 2001). Several interviewees have pointed out that government has an inalienable right to govern and that there are many instances where a Minister clearly insists on action (this may be especially the case where the initiative formed part of the programme for Government or election manifesto, which government has been elected to deliver). One example of this was the case of the plastic bag levy in Ireland. According to the Department of the Environment, ‘everyone’ was implacably opposed to this idea – from supermarkets and other retailers to the manufacturers of plastic bags. However, Government was firm, the enabling legislation was passed and when it came to drafting the regulations to implement it, all the various parties – while still opposed, ‘realised it was better to engage with government to arrive at an optimal implementation plan’. For example, butchers had particular issues concerning the wrapping of fresh meat, which was resolved during the consultation process with government. This was an issue which would not have occurred to government had there not been extensive consultation – ‘the operators on the ground know what is workable for them and what is not. We are quite willing to address their needs as there is no point putting regulations in place that simply

won't or can't work'. Or, as another official expressed it: 'it's often not the regulation that is the problem, it's hamfisted implementation. Consultation, maybe not necessarily about the core principles, but about the 'how' is important'.

## 2.6 Reflexive Governance and Innovative/Effective Regulation

The Environmental Protection Agency (EPA) is one organisation that has taken innovative approaches to consultation and the circumstances in which it uses it. According to a senior official, 'the more you consult, the better your chances of getting it right'. The EPA is committed to publication of its consultation processes, including submissions received (see [www.epa.ie](http://www.epa.ie) for details of the consultations on the Poolbeg incinerator and on emissions trading, for two such examples). The EPA points out that overall environmental strategy is set by the Department of the Environment and the EPA is charged with its implementation. For this reason, the EPA frequently is not in a position to consult about standards and objectives (particularly as these are often set either by EU or international protocols), but always seeks input to arrive at optimal implementation methods. (Accordingly there may be limited opportunity for cognitive reframing in some areas of its work.) It cites a recent example of regulation of the rendering industry where the EPA frankly admits that its original proposal (for implementation of the Animal ByProducts Regulation (EC) 1774/2002) was unworkable for industry and might have put some small operators out of business. On foot of the feedback to its consultation, it made the necessary changes. In other areas, where the EPA has a freer hand in carrying out its remit, it proactively engages stakeholders in co-design. For example, in one innovative programme, the EPA decided to undertake consultation with the academic and scientific research community to see how best to allocate funding under a Research and Development Fund which it administers that co-ordinates all environmental research in Ireland. One the first occasion of funding allocation, it had simply used the priorities identified in the organisation's own 4-yearly Reports on the Environment. But in the second round of funding allocation decisions, it sought inputs. All involved in the research field were brought together by the EPA to a special conference and asked what they wanted to work on. This was followed by nationwide workshops and then circulation of an initial paper of ideas. The outcome has been that much funding is currently directed towards socio-economic research on environmental impacts and the effects of environmental protection programmes, which would not probably have occurred to the EPA in the absence of consultation.

**Using Stakeholder Networks to Problem Solve: Tackling illegal landfills.** The Environmental Protection Agency had a supervisory role with local authorities, but limited powers. There was a major problem with illegal landfills and the EPA found that local authorities, while supposed to prosecute, were often failing to do so. Practices differed between authorities. The EPA set up an Environmental Enforcement Network with the Directors of Services responsible for waste in every local authority. The EPA organised training for these individuals and brought them together for brainstorming and problem-solving sessions. The Directors were very cooperative; it transpired they had never previously had any organised system of communication. In an interesting turn, the EPA involved the Gardai in training the local officials on evidence-gathering and preparation for court cases. This three-way initiative has led subsequently to greater awareness also among the Gardai of the extent and seriousness of the problem and further offers of help and cooperation. In addition, standard guidelines have been drawn up for dealing with discoveries of illegal landfills. Such was the success of this first network, that a Complaints Network has also been established, with one number for citizens to call and a public awareness programme (See Something, Say

Something) put in place (which has also helped overcome earlier widespread public confusion about the difference between illegal dumps and fly-tipping). Finally, the success of the network approach for tackling illegal dumping has now led to similar structures being put in place to deal with illegal packaging by local authorities themselves. The EPA also runs other networks; most recently one on water quality involving farmers and farm organisations, local authorities, the Fisheries Board and the Marine Institute has been established. The Director of the EPA says that her organisation has to be imaginative in its approaches, given both a very wide remit and limited resources of its own. She firmly believes that the network approach works very well for the EPA.

It also tries to take a partnership approach to problem-solving. It has worked with An Taisce (the National Trust for Ireland – an NGO) to foster Green Schools and is now moving this initiative further into a Green Homes project. It has also identified a gap in that ‘no-one’ is working on raising public understanding and information on climate change and is addressing this itself through organisation of public seminars, even though this aspect is not, strictly speaking, part of its mandate. In another example, the EPA emphasised stakeholder participation in another programme for which it is responsible - the allocation of carbon credits for carbon trading. In this case, some 110 organisations were involved and the EPA set up an Advisory Group to assess the fairest ways of allocating credits, primarily designed to ensure no businesses were put under undue pressure or put out of business (a real potential risk). The methodology was devised using external professional business consultants and agreed by the Advisory Group. It was then put out for general consultation, received extensive feedback and many substantive changes were made as a result. Both the proposed methodology itself and the submissions received were published. The EPA then had an initial ‘stab’ at allocating based on the draft rules and this again was put out for consultation. The allocation system was only then finalised. As the Director pointed out – ‘there have been no legal or other challenges to the new system’. For such a new, and potentially contentious regulatory regime, this underlines the effectiveness and meaningfulness of the EPA’s in-depth consultation and research on the matter. (see also Box on EPA’s innovative creation and use of networks as another way to engage stakeholders).

All this is happening despite the fact that, in its main field of work – licensing of industries with potential to pollute – the regulatory system is fairly prescriptive (EPA licences are very comprehensive and effectively set out how industries concerned are to conduct their business, often requiring real re-engineering of processes and procedures, as well as statutory requirement to use Best Available Technology). There is significant opportunity for industry to argue for changes and the EPA also offers expert help with licence applications (oral hearings are also possible), but there is no gainsaying the basic principles of the regulation. It is also an open and transparent system, with proposed determinations published, with scope for public comment (the entire process is online) before final decisions are made (see [www.epa.ie](http://www.epa.ie) for consultation documents on all of the above).

## 2.7 Other Examples of Innovative Regulation and Possible Reflexivity in Action

**Applying Learning, Innovative Problem-Solving: Food Safety Authority.** The Authority has taken an innovative approach to regulation, persuading all food processors to embed in their own systems new forms of hazard identification. In one case, a vet, working for a local authority in food safety had embedded a risk-based approach involving benchmarking and other tools. Following successful application of innovation in such a ‘hard’ area as food safety, he then

decided to apply a similar approach to the ‘soft’ problem of stray dogs, for which he also had responsibility. To achieve a reduction in the number of stray dogs being put down in that county from 90% to 10%, he created a new type of dog pound, using internet communication. The dog pound, apparently, has since become a tourist attraction!

**Self and Co-Regulation in the shadow of hierarchy: The Intoxicating Liquor Act 2008 (www.justice.ie).**

Notwithstanding its basis in the ‘hard’ law of this Act, which among other things, aims to prevent misselling of alcohol, particularly to minors, significant elements of its implementation were devised following extensive consultation with industry and other stakeholders. A new Code of Practice has been agreed with trade representatives on the display and sale of alcohol in mixed trading premises such as convenience stores, garages, supermarkets etc. This new voluntary agreement aims to achieve the government’s policy objective of combating underage drinking. Structural separation was deemed by government to be the appropriate tool and retailers have undertaken to deliver this, as well as to stop window advertising of alcohol sales, investment in CCTV and staff training. While the government was firm on its objectives in the consultations, it did not resort to the ultimate step of banning liquor sales in garages or small convenience stores outright and it also listened to small businesses’ concerns about the costs imposed on them of having to construct entirely separate facilities to accommodate alcohol sales. The resulting Code could be said to stem from a shared learning and problem-solving process – at least in terms of implementation. However, one senior official in the Department of Justice, Equality & Law Reform also noted: ‘We need to be careful in consultations like this one to be clear about the difference between lobbying and bowing to vested interests versus real common problem-solving and learning from stakeholders’.

Although the system of social partnership seems to promise much in respect of potential for reflexivity, the cosiness inherent in the process was at the heart of criticism offered in interview by one Regulator and also (perhaps surprisingly) by a senior official with NESC. ‘The main flaw is that the actors have remained the same. We’ve never changed the cast. That militates against innovation and fresh thinking. What’s more, rather than being reflexive and learning from one another, what’s happened now is that everyone is inside the tent. The aim is always to achieve consensus; everyone has to feel they come away with something. In the effort to please everyone, decisions can be very much watered-down and no real brave steps are taken. The consensus culture is too strongly ingrained’. It is argued that relationships have become so entrenched that the real value of joint problem-solving – the original rhetoric and objective of social partnership – may have been lost over time. There is a further problem identified by NESC itself, which is that too much of the work has been carried out at the level of national representation as the interests being brought to the table are at the head office level. ‘it’s not always easy to recast and reframe issues, as the actual experience or expertise may not be at the table’, in the words of a NESC official. This individual concludes that ‘centralisation militates against reflexivity’. This may well hold true for the social partners, but many observers on the other hand, rated the importance of central control at *government* level over the overall process located within the powerful Department of An Taoiseach.

In contrast, it is argued that the sub-structure of local partnerships (initially set up in 12 disadvantaged areas and later extended) have worked more reflexively. Charged with coming up with ideas to address long-term unemployment, some of these bodies (cf the Northside Partnership, [www.northsidepartnership.ie](http://www.northsidepartnership.ie)) have developed very innovative schemes which have

fed up to the national level. This has resulted in tweaks of regulation in order to help deliver on the schemes proposed locally. NESc cites the establishment of such new institutional structures themselves as an example of reflexivity; demonstrating willingness to find ways to involve actors on the ground more deeply in the problem-solving process.

**Co-design involving stakeholders: Property Services Regulatory Bill 2008 ([www.justice.ie](http://www.justice.ie)).**

This Bill will establish the Property Services Regulatory Authority. This represents a direct response to one of the key recommendations of the Auctioneering/Estate Agency Review Group (a consultative forum which included consumer interests, the Competition Authority, the Law Society, the farming sector, government departments and industry), set up by government in 2004 and charged with coming up with a regulatory framework for standard-setting and monitoring in the property services market. The Review Group itself was established in response to perceived misleading practices and consumer detriment. Instead of a command-and-control or hierarchical approach, government has decided to commence with a Code of Practice, which will be introduced on a voluntary basis initially (presumably in the shadow of impending legislation which will enforce compliance if adequate take-up and effective implementation is not quickly in place). The Code identifies key principles and values which should guide property services and sets minimum standards of professional conduct. It also provides for a complaints procedure and a Disciplinary Board. The main functions of the new Authority will be to operate a comprehensive licensing system for the industry, to set and enforce standards for the grant of licences, to establish and administer a system of investigation and adjudication of complaints, to operate a Compensation Fund and to increase consumer protection.



## 3. United Kingdom

### 3.1 Culture and Administrative History

The UK can be regarded as the standard-bearer of regulatory reform in Europe. It was the first country to establish Better Regulation bodies within government, more than 10 years ago. We can trace the origins of this thinking to the Thatcher era of the 1980s and thereafter. The developments that ultimately led to Better Regulation originate in the deregulatory policies and public sector reforms of that period. The underlying political philosophy of the Thatcher era was characterised by a commitment to personal freedom and choice and the retreat of centralised government control. Two governmental White Papers entitled ‘Lifting the Burden’ (1985) and ‘Building Businesses not Barriers’ (1986) reflected the importance of promoting entrepreneurship and the withdrawal of burdensome State regulation. 1986 guidelines directed departments to assess the objectives and impacts of proposed regulations and consider alternatives to regulation.

In the early days, public sector reform along New Public Management lines is seen in the Private Finance Initiative (PFI) of the early 1980s, which increased the use of private investment to provide public services, and then the development of public/private partnerships to deliver services such as bridges, roads, prisons and health and educational infrastructure. The Financial Management Initiative (FMI) followed in 1984, with a focus on outputs and greater efficiency. The Next Steps Report of 1988 built on these foundations, suggesting that agencies be established to carry out executive functions within a policy framework set by ministers. In the 1990s, central government departments were downsized and further decentralisation/delegation of responsibilities continued. A further set of reforms focused on an ethos of quality customer service was launched with the Citizen’s Charter that was unveiled by then PM John Major in a speech in 1991 (Barron and Scott 1992).

Of course, the NPM changes were undertaken at the same time as broader alterations to government intervention in the economy and in society, of these the most significant being the privatisation programme. The perhaps unexpected consequence of mass privatisation was the ensuing need for *more* regulation (Majone 1994; Moran 2003). As the public service downsized, the numbers employed in regulatory agencies increased. The mid- to late 1990s saw a stream of complaints from business about the burden of complying with what Michael Heseltine in Parliament famously referred to as ‘the tide of regulation’ (with particular reference to that emanating from the EU), and which led to his promise to build a ‘bonfire of regulations’ and the publication of ‘Cutting Red Tape’ in 1994 (quoted in Radaelli, 2007).

Reform continued in the UK with the change to a Labour government in 1997, but - the language changed. The ‘Better Regulation’ terminology emerged in Britain at this time, with the establishment of the Better Regulation Taskforce (BRTF) in 1997. This was an independent advisory body, located in the Cabinet Office, with a majority of members from the business sector. It was charged with taking the new Better Regulation initiative forward and was given the express task of considering the needs of ‘small businesses and ordinary people’. Within a year, the BRTF published a set of key principles of Better Regulation.<sup>14</sup>

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<sup>14</sup> The principles were: proportionality, accountability, consistency, transparency and targeting.



The Compliance Cost Assessment procedure that had been previously used was replaced with a more developed RIA process. By 1999, Regulatory Reform Ministers were appointed in every Department. The Regulatory Reform Act was passed in 2001. In 2004, the drive to reduce red tape was given added impetus with the news that the Prime Minister would chair the Panel for Regulatory Accountability and the BRTF launched investigations into unnecessary regulation and regulatory creep.

In 2005, the BRTF published a report 'Better Regulation – Less is More' (Better Regulation Task Force 2005), and the Hampton Review on Reducing Administrative Burdens was also published (Hampton 2005). The 'Less is More' report recommended several new ideas for reducing burdens. In particular, it urged the introduction of the Dutch approach of applying targets for reducing costs to business and the imposition of the 'one in, one out' rule for regulation. The Hampton Review recommended comprehensive risk assessments to be used by regulators in order to concentrate resources in areas that most needed them. UK government departments have since been instructed to set new fixed percentage targets for the reduction of information burdens they impose on businesses.<sup>15</sup>

In 2005, when it held the EU presidency, Britain attempted (unsuccessfully) to reform the Commission's model for consultation along the (more extensive) UK lines.<sup>16</sup>

Despite this extensive Better Regulation activity, Baldwin (in Weatherill, 2008, 31-46) argues that the different messages emanating from government since 2005 have given rise to distinct problems. He suggests inherent tensions between Better Regulation and a perceived shift to 'less is more' in UK political thinking. In particular, he claims that RIA's emphasis on CBA and on examining a single proposed measure may not, in fact, be in line with the aim of providing better *quality* or 'smart' regulation. He points out that both the National Audit Office in the UK<sup>17</sup> and the British Chambers of Commerce<sup>18</sup> have been critical in recent studies of the operation of RIA.<sup>19</sup>

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<sup>15</sup> In May 2004, a major piece of research was published. This was a 10-country study of RIA practices, conducted under the troika Presidencies of Ireland, Italy and the Netherlands. The resulting report concluded that the UK offered a Best Practice Model for RIA. The UK operates an integrated and comprehensive system. There is a special (independent) oversight unit (as also exists at the EU level, but not in Ireland). The methodology includes ordinary quantitative and discounting to net present value (NPV) formulae. Alternative options are clearly considered and, wherever possible, full cost-benefit analysis is carried out. Even where costing is not feasible, quantification is still attempted (e.g. numbers of lives saved, tonnes of CO<sup>2</sup> emissions avoided, etc.). The UK was considered to be among the most transparent in terms of demonstrating where and how the RIA process had influenced regulatory outcomes; it takes a broad view of stakeholders (e.g. RIA must be undertaken whenever there is a potential impact on charities and the inclusion of small businesses is emphasised); the EU standards of consultation are taken into account and the RIA process is undertaken early. In the words of this Research Report, RIA is not just a 'bureaucratic add-on' in the UK. Reference\*\*\*

<sup>16</sup> At that time, the EU process allowed 8 weeks for stakeholder consultation; the UK model envisaged 12 weeks and was regulated by a Code of Practice and monitored by an Annual Report on Consultation.

<sup>17</sup> NAO 'Evaluation of Regulatory Impact Assessments Compendium Report' 2003-4 HC 358 (March 2004).

<sup>18</sup> Ambler, Chittendon and Shamutkova, 2003 and 2004.

<sup>19</sup> The NAO found in 2004 that only half of the 10 RIAs it examined, included a 'reasonably clear statement of objectives' and 7 out of 10 did not consider any alternative option other than the one preferred by the department. None considered the do-nothing option. In January 2009, the NAO found that whilst more IAs quantified costs and benefits of the preferred option, only 20% presented evaluation of alternatives. The Chambers of Commerce found in 2004 that some departments were badly resourced for conducting RIAs and that sometimes statements that benefits outweighed costs were not in fact supported by the evidence.

However, at this stage, Better Regulation is institutionalised in British governance. By 2006, the Better Regulation Commission (BRC) had taken over the work of the BRTF and the new Better Regulation Executive (BRE) had been established in the Cabinet Office.<sup>20</sup> Meanwhile the ‘Modernising Government’ White Paper of 1999 took up reform where NPM left off.

There is clearly a strong commitment to evidence-based policymaking in the UK and the impact assessment inherent in Better Regulation practices has become the core tool for producing the necessary evidence to allow a Minister or Parliament to approve any new proposed legislative or regulatory measure. In that sense, the thinking behind Better Regulation principles can be said to have permeated throughout the British system of government decision-making.

Ever more sophisticated and detailed approaches to regulatory assessment and lately compliance<sup>21</sup> continue to appear. The rules for impact assessment, built over many years of experience now, are very detailed and allow for monetisation and full CBA, while taking into account social and environmental impacts as well as economic ones. There is an extensive range of tests both qualitative and quantitative. New interactive tools for consultation continue to be developed. The Legislative and Regulatory Reform Act (2006) aimed to make it quicker and easier to deregulate and to reduce bureaucracy for both business and the voluntary sector. The recent focus appears to be on more responsive regulation. The drive for deregulation and for Better Regulation in the UK can be attributed in large part to the need to attract international investment and present Britain as a business-friendly country (particularly given its international importance as a global financial centre).<sup>22</sup>

### **3.2 The Focus of Better Regulation – All About Burdens on Business?**

In HM Government’s 2009 Summary of Simplification Plans across Government, ‘Making Your Life Simpler’, published by BRE, ([www.betterregulation.gov.uk](http://www.betterregulation.gov.uk)) the answer to the question ‘What’s Better Regulation all about?’ is as follows: ‘It’s about cutting out unnecessary paperwork and out of date rules –making life simpler for everyone. We are making huge efforts to identify and get rid of unnecessary bureaucracy for businesses, large and small, across all sectors, making a real difference...’ In the Foreword to this document, the Secretary of State for Business, Peter Mandelson, states: ‘The Government has an ambitious regulatory reform agenda and reducing administrative burdens for business is an integral part of this. We are making sure that we have the most effective regulatory environment for business’.

In 2007, the BRE was transferred to the Department of Business, Enterprise and Regulatory Reform (BERR), the successor department to DTI. Under Gordon Brown’s premiership, the BRE’s agenda for the next few years includes:

- driving forward the Better Regulation agenda in Europe;
- following the Commission’s recommended 25% target for reduction of administrative burdens emanating from the transposition of EU laws;
- driving Better Regulation methods down to local government levels;

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<sup>20</sup> The BRC is independent of the government and operates as a think-tank, while the BRE is the operative body that ensures implementation of Better Regulation across government departments.

<sup>21</sup> The McCrory Review of Regulatory Penalties 2006.

<sup>22</sup> Britain ranked sixth out of 175 countries in a 2007 World Bank study of ease of doing business and fifth out of 178 countries in 2008.

- introducing implementation improvements as laid out in the Hampton Review; ensuring that departments regulate only when necessary.

In the views of some BRE officials, the move to BERR has tended to reinforce a message that Better Regulation in Britain is all about business. One commentator described three possible interpretations of Better Regulation, as follows:

- delegation of decision-making and governance outwards, such that a linear process where the centre decides
- an interpretation which focuses on smart forms or regulation and alternatives to command-and-control
- a more narrow interpretation focused on the allocation of risk and reward in the economy, which prioritises enhancement of the environment for business

In the opinion of this commentator (a senior civil servant), Britain has ‘decisively’ chosen to follow the third stream. Whilst there may be some reflexivity in the consultation processes, where business interests are asked to participate in the design of solutions, the overall focus and community with which Better Regulation concerns itself is narrow. Further, a clear assumption exists that less regulation, light-touch regulation and the removal of administrative burdens and reduction of compliance costs for business is the purpose and sole remit of Better Regulation practices. This, it is claimed, is an approach which neither embraces nor promotes reflexivity. This same commentator suggested that, when Better Regulation was first articulated in the mid/late 1990s, the rhetoric was much more finely balanced and nuanced and the concept had the potential to embrace a wider view of regulation across wider spheres. However, business interests have subsequently ‘hijacked’ the Better Regulation agenda and the application of the initial, more rounded conceptions of what Better Regulation might entail, have in fact, migrated to other arms of government.

There appears to be some merit in this argument, as the Cabinet Office is driving forward a very interesting programme of citizen engagement oriented towards the reform of public services and better delivery of services. Indeed, the Cabinet Office is wholly engaged with ‘transformational government’. A unit bearing this name has existed within Cabinet Office for four years and arguably its remit amounts to Better Regulation beyond business. Much of its rhetoric echoes the language of Better Regulation but is clearly operates separately, but with all the authority of the centre. Active and innovative consultation is happening with Customer Insight forums, citizen juries, local and community-based initiatives etc. As one official said: ‘the delivery of better public services must not be separated from consultation; the process is continuous partnership with those using the services’.

The Next Stage Review of the NHS which is aimed towards personalisation of health services and offering alternatives to classic top-down government action ([www.ournhs.dh.gov.uk](http://www.ournhs.dh.gov.uk)) and the Green Paper on Policing ([www.homeoffice.gov.uk/police/policing\\_green-paper.pdf](http://www.homeoffice.gov.uk/police/policing_green-paper.pdf)) are two examples of the new approach to transformational governance. Reduction of burdens on citizens (such as the Tell us Once campaign, designed to reduce the burden on citizens of ‘avoidable contact’ with the public service – see [www.cio.gov.uk](http://www.cio.gov.uk)) is another major programme underway. Meanwhile, the reform of the public sector itself is also linked in, with modernisation and training of civil servants within a strongly performance management-driven context underway through the

Excellence and Fairness programme, also driven from the Cabinet Office (see [www.cabinetoffice.gov.uk/strategy/publications](http://www.cabinetoffice.gov.uk/strategy/publications)).

The Government has set targets for the reduction of administrative burdens, not only on business (target is net 25% reduction by 2010), but also on the Third Sector (charities, social enterprises and voluntary organisations) and on the public sector itself. In the last case, the strategy for the reduction of burdens on the public sector was established in 2007, in response to concerns of frontline workers. The target is for a 30% reduction in burdens by 2010.

Many of the tools of Better Regulation actually deployed in Britain should be quite reflexive in nature. The approach of the Hampton Review itself starts from the viewpoint that all regulation is a series of conversations ranging from sanctions to downloads of Codes of Practice. It can be considered that, as the needs of business change, so too does the regulatory response. One of the innovative insights of Hampton can be said to be its recognition of the importance of the ongoing interaction and dialogue between the regulator and the subject(s) of regulation. On the other hand, the risk-based, quantified model which all UK regulators are now obliged to use (concentrating their regulatory efforts on the riskier end of the spectrum, while leaving less risky subjects more or less alone, perhaps requiring only adherence to minimum standards), may be thought of as highly mechanistic and not conducive to reflexivity.

To argue against the idea that Better Regulation in the UK is all about business, one can point to the latest (2007) Guidelines for Impact Assessment. Economic, social and environmental impacts must all be assessed. In addition, for 'all relevant policy proposals, separate race, disability and gender impact assessments must be produced and published at the same time.

However, the latest (November 2008) BRE Annual Review opens by highlighting achievements in the drive for simplification and reduction in the burden of regulation. The first page states 'in 2008, we have delivered over 240 measures to simplify regulation, taking the total savings to date to about £1.9bn. At the halfway stage of the programme of simplification, we are seeing a culture change across government in the way we regulate and engage with business and service providers'. It is pointed out that BRE's measures are externally validated by a panel 'including business interests, who have reviewed and confirmed approximately 80% of departments' claimed savings'. The case studies contained in this Annual Review predominantly feature businesses<sup>23</sup>. However, the Annual Review also addresses some simplification measures aimed at charities (simpler registration procedures and changes to the Criminal Record Bureau checks for volunteer workers) as well as some dealing with the public sector (paperwork burden reduction for the police, plus the medicines regulations review mentioned above) and finally, in relation to citizens, the BRE cites only increasing the time period for validity of Energy Performance Certificates as a

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<sup>23</sup> Highlighted achievements include:

- removal of the need to appoint a company secretary for many smaller businesses
- simplification of the Companies Act
- enabling electronic communication with shareholders (instead of having to mail out annual reports etc)
- reform of fire regulations (to make it easier for businesses to understand and comply with fire safety)
- reform of medicine regulation (to enable faster market release of over-the-counter medicines, following any change to them)
- enabling of self-certification of building work
- new employment law guidance and tools

cost saving for landlords and house sellers. But the greater focus is on the benefits and cost savings to business delivered over the year in question.

Other issues emerging in the UK show how sophisticated the regime has become. The extension of the Compliance Code (Hampton principles) to public sector regulators when they are engaged in regulating private sector entities is currently underway. But Hampton itself is very much private sector focused. As one BRE official put it: ‘Under Hampton, we operate a light touch. If you pass an inspection really well, the reward is that you don’t have to undergo another inspection for, say, two or three years. But, in fact, many public sector organisations like hospitals don’t want that regime. They actually want more frequent inspections because they’re dealing with life-and-death issues’. This official suggested that the difficulty centres on the fact that regulation in the UK is firmly rooted in the concept of enhancing competitiveness and productivity and so, many of the principles and practices of Better Regulation, ‘however nuanced their development over the years, simply don’t translate all that well outside the private sector’.

There seems to be consensus that the Better Regulation regime in Britain, despite recent forays into mapping burdens on public sector staff, is primarily focused on business interests and reducing burdens for business. The presence of the BRE in BERR arguably underlines this.

However, some of the independent regulatory agencies take a different view. Both Ofcom and Ofgem point to their statutory obligation to have regard to the consumer interest. Ofgem states of its remit ‘ours is emphatically broader than just costs to business’. Its remit is to promote the interests of consumers, which is ‘mainly done by promoting competition, but only where that is appropriate’.

It was perhaps surprising to discover that there does not appear to be much shared learning across government departments and regulators on their experiences with, for example, stakeholder engagement strategies or consultation. The Department of Health is currently developing a toolkit that will attempt to capture all its experience and knowledge and act as a best practice model. But, as we discovered in our interviews, Ofcom’s documentation and guidelines ([www.ofcom.org.uk](http://www.ofcom.org.uk)) as well as the Department of Health’s own existing toolkit on stakeholder mapping (see Appendix II) might well be useful to others. An appropriate network to facilitate such cross-government sharing does not appear to exist, or if it exists, is not very effective. In relation to impact assessment as one example, there is a need to link knowledge across different levels and sectors of government in order to have a more unified and shared understanding of what it actually is, and a best practice model of how to do it.

### **3.3 Evaluation Measures**

It was claimed by one commentator that there are four ideal types of impact assessment: 1. Full cost assessment, which aims to optimise or capture the full cost and benefit of any proposed regulation and compares options on efficiency criteria; 2. a policy integration tool, geared towards achieving overarching goals like increased competitiveness and which focuses on synergies and trade-offs; 3. issue-specific assessment that focuses on impact on a sector (business) or on administrative burdens or on the environment and 4. justificatory assessment, where it is undertaken as an exercise to justify an already largely agreed course of action and where neither option consideration nor real stakeholder participation matters. As this commentator noted, there are examples of all four approaches at work in the UK. We might add in a fifth possibility (raised



by many interviewees) that impact assessment may be defensive in nature, used to protect policymakers from legal actions. A cynical observer might add even a fifth possibility – control of politicians! If it is claimed that a new regulation – say on the introduction of a smoking ban – will reduce deaths from cancer and/or reduce associated healthcare cost – that is a measurable outcome against which politicians can be judged.

There is no doubt, though, that impact assessment is at the heart of the UK's Government's commitment to evidence-based policymaking. From a perspective of rationality, the elements of IA, i.e. root-and-branch analysis of multiple options, separation of means from ends, radical division of roles between bureaucratic dispassionate analysis of evidence all help 'take the politics out of the decision'. The insistence on credible transparent procedures such as giving reasons for regulatory proposals (and for the need for government intervention in the first place), producing adequate evidence and putting this into the public domain all contribute to legitimising regulatory action and promotes compliance (increasing the social acceptability of regulation). Finally, as Radaelli (2009) suggests, 'RIA is a fire alarm for those affected by proposed regulation'.

Depending on the department or regulator involved, there may be little consistency in terms of how impact assessment (IA) is routinely deployed. In practice, it has been claimed that there are gaps between the requirements and the operation of impact assessment. The most recent NAO review (published January 2009) found that, while BRE's new (2007) guidelines for IAs have helped to improve the overall standard of IAs, there are still wide variations in quality between different elements within individual IAs, and there are also marked differences between the best and the worst examples ([www.nao.org.uk/publications](http://www.nao.org.uk/publications)). There is often inadequate use of economic tools (there may be a lack of essential economic expertise in many departments) and quality varies. There is ambiguity around the Guidelines and limited standardisation of tools. Different understandings of impact assessment and what it is supposed to deliver exist. We have also seen that there is even tension between procedures and guidelines for consultation carried out as part of impact assessment and broader consultation as covered by the new Code (a point highlighted by BRE itself in interview).

That said, the revised (2007) Guidelines on Impact Assessment state clearly that it is 'both a continuous process to help the policymaker fully think through and understand the consequences of possible and actual Government interventions...' AND 'a tool to enable the government to weigh and present the relevant evidence on the positive and negative effects of such interventions'.

Insofar as the latest rules on impact assessment are concerned they can be summarised as follows:

- Impact assessment is required for 'any proposal that imposes or reduces costs on businesses or the third sector'. Any proposal similarly affecting the public sector requires an IA, unless the costs involved fall below a pre-agreed threshold (usually £5m).
- This means an IA is required for primary and secondary legislation, as well as codes of practice or guidance and for self or co-regulation proposals, where the effect will be to increase or decrease costs
- IAs are also required for proposals that are not regulatory in source, but nevertheless impose costs on public sector or third sector organisations that deliver public services (but using the principle of proportionality)
- The Guidelines recommend that IAs are prepared 'from the earliest stages of policy development'



- Publication (or republication) of the IA is required when a policy proposal is taken to public consultation, when a Government Bill is introduced in Parliament, or when a draft SI is laid down in Parliament, immediately prior to implementation of the statutory or other regulatory measure and at review after implementation
- It is recommended that policymakers should gather evidence at the earliest stages to consider the case for Government intervention. Alternatives to classic regulation ‘should be properly considered’.
- Ministers ultimately sign off that they consider the IA ‘represented a fair and reasonable view of the impact, costs and benefits of the policy and that the benefits justify the costs’. Departments ‘must facilitate these Ministerial declarations by involving their economists from the earliest stages...by appropriate use of external panels of key stakeholders or professional experts to review the evidence...by peer review by economists....’ etc
- A new area on the internet has been established where summaries of all published IAs will be available, together with links to departmental websites
- The evidence base presented ‘should include a mix of narrative, analysis and research...it is particularly important that the evidence base should show how the headline costs and benefits have been generated, by clear and transparent disaggregation of figures. The balance of economic, social and environmental costs and benefits should emerge clearly’.
- The Guidelines, together with HM Treasury’s Green Book sets out the procedures and tools to be used in monetisation and presentation of the cost benefit analysis. The key phrase is: ‘the summary must take account of the full range of costs and benefits: economic, social and environmental; these should be monetised as far as possible’.
- Finally, race, disability and gender impact assessments are a statutory requirement for ‘all relevant policies’ and these should be ‘rigorous and robust’ and must be published at the same time as the policy is published (meaning White Paper stage for proposed legislation).

In an ideal world, impact assessment should go through three steps of scoping out options, providing a forum for consultation and finally used to design policy, as well as to legitimise the ultimate decision. Is it really being used in this way? Other commentators argue that rigidity is part of the problem and if tools are standardised, the scope and potential of impact assessment is narrowed even further. One civil servant said: ‘Impact assessment is not an on/off switch. It should be a dynamic process and integrated into officials’ work. But this isn’t always the case, not least for lack of resources, or lack of commitment and sometimes of the necessary expertise.

Other commentators have pointed out the difficulty of fitting soft regulatory measures, light-touch regulation and responsive or collaborative approaches to policymaking with the more rigorous, technical demands of cost-benefit analysis as demanded by impact assessment. Ofgem suggests that it has received some criticism in the past, because it has made a decision based on principle, rather than strictly ensuring that costs do not outweigh the benefits. It says that it ‘holds the line’ on this. While BRE’s guidance for central government departments is to focus on monetisation, Ofgem is not so strictly bound by that and has greater freedom to set out its own guidance for impact assessment in line with its (different) statutory duty.

Future developments may centre more around outputs, rather than inputs and also around long-term outcomes. There is increasing criticism (at least in academic circles) about the absence of ex-post review. However, as long as impact assessment remains more of a process than anything else, this is difficult to do. However, if thinking moves more towards appraisal of outcomes – did the

measure achieve the original objectives – such as increased competitiveness, better environment, then we may see more emphasis on evaluation in the future. Review is now emphasised in the 2007 revised Guidelines on Impact Assessment. Ofcom is one regulator whose thinking may be already moving in this direction. However, it can sometimes be difficult especially in broader or ‘softer’ policy areas to ‘hold all else equal’ and attribute an outcome directly back to a particular decision alone.

Within BRE itself, there is a specific Regulatory Innovation Group which is dedicated to reviewing all aspects of the operation of Better Regulation processes in order to come up with ideas for – *inter alia*, better consultation, better communication. One of its recent undertakings has been to examine whether too much information is, in fact, produced for consumers with the unintended consequence that perhaps consumers may miss, or ignore, key elements. (cf ‘Too Much Information Can Harm You – see BRE website). This Group points to the Ministry of Justice and the Sustainable Development Commission as bodies currently experimenting with new methods of reaching out to people in consultations. Online communities, social networking sites and blogs are among the tools being deployed.

According to BERR itself, the presence of the BRE within that Department creates a pressure to be a leader in implementation of Better Regulation. It routinely carries out informal consultations with key stakeholders prior to publicising proposals. Key stakeholders are defined as CBI, TUC and also leading academics.

Ofcom is currently trialling a new approach to evaluating the outcomes that flow from policy decisions. It has developed a one-page checklist for use by officials to evaluate policy outcomes. The responsibility for following up on projects and evaluating outcomes rests at the level of steering groups within Ofcom. Each group has to look at one previous decision every year. In the future, they have to constantly consider whether benefits are reflowing through and, if not, then remedial action has to be taken. It is also possible that evaluations may be published in the future. Officials say that impact assessment must not be seen as a separate process, it should be integral to the policymaking process. However, they are also self-critical, saying that annual reports are still too process-oriented (easier to measure); ‘we are moving more towards outcomes and proper evaluation of subsequent benefits, but we still have a way to go’. Equally, Ofgem suggests that it has recently strengthened the emphasis in its IA guidance on assessing impacts on sustainable development – both social and environmental (having been criticised in the past for weakness in analysis of this area)

In a further comment, Ofcom officials said that their attempts to bring in creative thinking to balance the ‘necessary prudent and risk-oriented focus of a regulator and to engage stakeholders innovatively in problem-solving ‘is not necessarily happening in tandem with Better Regulation per se – Better Regulation can sometimes be too prescriptive and focused on target-setting. Actually, it tends to stifle creativity’. Ofcom aims to create a healthy tension within the organisation between creativity and prudence, and believes that it is challenging traditional regulatory models with a more open-minded approach. In the words of one Ofcom official: “We can see the value in targets for reducing administrative burdens, but we would not want this to stand in the way of a strategic approach to regulation that focuses on identifying the key problems in a sector and then finding creative solutions”.

Apparently, a lot of work is also currently underway in Ofcom (involving behavioural economics) to develop methods to measure social benefits. To take one example, Ofcom staff ask: “How do you measure the value (and not just the burden) of the public service broadcasting remit and how can this be factored into pricing and funding regimes for BBC and ITV”? The organisation says that, while Better Regulation is embedded, it has had the freedom to develop interpretation and implementation itself. ‘The rigidity of Better Regulation is its Achilles heel. The whole thing about good regulation is flexibility and that doesn’t sit easily with a fixed set of rules’. This, according to officials, ‘facilitates learning and reflexivity. We’re not so focused on having 20 formal regulations, but finding the least complex and most workable way to address problems’.

For its part, Ofgem claims it has a good track record in looking at alternatives to regulation and has put in place a number of self-regulatory regimes involving Codes of Conduct etc.

### 3.4 Dialogic Measures

Consultation methods and approaches in the UK have developed greatly. It was acknowledged by BRE that open, public consultation on impact assessment is the norm for virtually every project. The methods deployed are often more innovative than the usual call for written submissions which prevails in Ireland. The consultation system in the UK has ended up in judicial review (over the 2006 Energy Review consultation on nuclear power<sup>24</sup>), resulting in the Department concerned being forced to re-commence the process all over again. Mentioned by several interviewees, this experience has informed the latest (2008) Code of Practice on Consultation, ([www.betterregulation.gov.uk](http://www.betterregulation.gov.uk)) whose provisions are sensitive enough regarding timings of consultation processes and their duration, based on the level of technicality versus likely public interest, holiday periods etc. The need to think ‘outside the box’ vis-à-vis reaching out to potential stakeholders is emphasised. This Code of Practice has since been adopted across Britain and has become a national template for best practice (e.g. Transport for London is one of the many bodies to implement it).

The prime mover behind the new Code of Practice, a senior official with BRE, said that the UK government sees consultation as the main tool of evidence-gathering. The proposal put out for public consultation may already be reasonably well worked-up (having already tapped into key stakeholders privately), but the point of the public phase is to test the assumptions. The new Code attempts to address criticisms that government tended to consult ‘too late in the day’ and that there was also failure to feed back to participants, to let them know what impact their input may have had. In relation to consulting ‘late in the day’, BRE suggests that it is difficult to find the right balance. ‘You want to put out enough material to stimulate a debate, but that means you do have to wait until you have enough solidly evidenced material. And yet, you need to consult while there is still enough remaining to be determined so that people can feel they have an influence on outcomes’. Under the new Code, all departments now have to provide a statement on what effect responses to consultation have had on a particular policy proposal (the previous Code had also required this, but publication was required within three months and departments often got away with providing minimal information – the new provisions overcome this by insisting that publication happen before or in tandem with the ‘next significant action’).

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<sup>24</sup> *Greenpeace v Secretary of State for Trade and Industry* [2007] EWHC 311.

The real innovation in the new Code is its insistence that departments provide better clarity on the scope of a consultation process. In essence, much consultee frustration was found to stem from poor management of expectations. Now, the scope for change in any proposal and therefore, the extent of potential consultee impact has to be made clear. (It is noteworthy that some of these concerns are currently coming to the fore also in Ireland, with its less mature system). As one interviewee noted, ‘there is no doubt that departments and agencies do make changes on foot of consultations, but it not always clear how significant those changes are’.

There are about 600 consultations per annum in Britain, many of them quite narrow or highly technical in nature. There is an important provision in the new Code which states that full written consultations (previously very much the norm in the UK) may not always be needed. This recognises both the different types of proposal (and the scope for influencing change) and also facilitates greater innovation and flexibility (and reflexivity?) in dealing with stakeholders in more tailored, audience-appropriate ways. However, as BRE points out, this provision is not in line with current IA guidelines which appear to generally assume formal written consultation as the standard. There is a clear tension emerging therefore between specific Better Regulation practices and government’s wider consultation focus in relation to evidence-based policymaking. This directly echoes a comment made by a senior Irish civil servant that a clear distinction can be (and perhaps ought to be?) made between consultation undertaken for RIA purposes, and more general consultation.

The Department of Work & Pensions recently ran a consultation on the welfare system (see [www.dwp.gov.uk](http://www.dwp.gov.uk)) for lone parents and ran into trouble with an organisation representing lone parents who homeschool their children because the Department had not written individually to every single such lone parent! This level of unrealistic expectations is not unusual, apparently, in fact, according to BRE, the DWP had been quite innovative in its consultation methods, tapping into community events, using The Sun newspaper etc. But they did not tap into the fact that all lone parents on benefit must by law, meet a public servant regularly to discuss work opportunities. BRE felt that this system would have offered an innovative conduit to consult with stakeholders. DWP, however, did not believe that such public servants were ‘adequately briefed or trained to talk about wider policy issues’. BRE continues to believe that the ‘arms of government dotted around the country’ offers a valuable resource for consultation. (It may be that the Cabinet Office thinks the same as it is thinking about these same public officials in relation to proposed reform of delivery of public services as well as future consultations under the Excellence and Fairness programme).

BRE says that it is ‘quite reliant’ on representative organisations and – in another echo of an issue raised in Ireland – bemoaned the fact that government departments are often dealing with ‘London-based, head office policy officials, and not getting to members on the ground’. There was a consensus among our interviewees that organised interests can dominate the very important deliberations and key stakeholder consultations that invariably take place in the proposal development phase, before any formal or public consultation is undertaken. Some representative organisations are much better at reaching out to, and canvassing opinions from, their members than others. The provisions of the new Code in relation to timescales for consultations specifically address the issue of allowing organisations sufficient time to do that.

Not dissimilar to claims made by Irish regulators, it was asserted by an official at the National Audit Office (NAO) that the independent regulators in Britain are more reflexive in their approach

than central government departments. This was largely attributed to their statutory mandate in respect of consumer protection, which, it was argued, renders them less liable to capture by business interests and often more innovative in their efforts to engage stakeholders. They might enter a consultation based on a central objective (e.g. a decision on pricing controls *has* to be made in five years time), but everything pertaining to that decision, from timescale of introduction to the principles to be used in making the decision, will be put out for consideration.

In the Home Office, officials also acknowledge that considerable stakeholder engagement is undertaken before public consultations. The department operates a number of Advisory Committees that are set up to advise and provide input into various policy issues as they are being considered. The most recent example cited was new legislation proposed on Animal Scientific Procedures, ( see [www.homeoffice.gov.uk/science-research](http://www.homeoffice.gov.uk/science-research)). Organisations representing animal welfare, as well as the education sector, business representatives and other government parties are represented on the Steering Group for a programme to simplify the regulation of animal scientific procedures. Even in the recent large-scale public consultation of the new Drugs Strategy, the consultation documents were ‘informed’ by extensive earlier deliberations with, again, a specially convened Advisory Committee of key stakeholders ([www.homeoffice.gov.uk/documents/drugs-our-community-consultation](http://www.homeoffice.gov.uk/documents/drugs-our-community-consultation)). In consequence, the ‘end result shouldn’t be that different if you have done all the necessary work in advance’.

The Home Office suggested that many of its consultations are primarily about implementation – the imperative for action originates with the Minister or government manifesto. For example, consultation is currently underway on the introduction of ID cards ([www.ips.gov.uk/identity/downloads/NIS\\_legislation.pdf](http://www.ips.gov.uk/identity/downloads/NIS_legislation.pdf)), where the Home Office is ‘working closely’ with business on optimal implementation methods and roll-out, but the core policy decision was previously agreed by the Government and reflected in the Identity Cards Act 2006 (and therefore, is not apt for consultation). The Home Office also points out that, despite prevalent noise about public consultation being primarily about ‘box-ticking’, in fact on average, it would normally only receive about 100 responses to even its biggest public consultations, although as many of these are from representative organisations, they may reflect a much wider community. Officials also suggest that for some situations, the apparently low level of responses might in fact indicate that the informal stakeholder engagement carried out earlier has addressed matters which would otherwise have been raised at the later stages of the public consultation process.

The water regulator, Ofwat, acknowledges that ‘policy is often quite well-developed before we go to public consultation’ and that ‘substantial changes at the public consultation phase are less likely to happen’. In a more general comment on government consultation, a senior Ofwat official observed that ‘public consultation often happens 18 months into the policy development and things are well developed by then’. There is extensive consultation by Ofwat with stakeholders in the earlier stages but, as its official said, ‘we’re not consulting on the objective or core policy; we do, however, consult widely on implementation options. We don’t dictate how the objective ought to be delivered, we want to know what’s workable and ask those we regulate to tell us’. The method used with key stakeholders takes the form of workshops, including proactively seeking meetings. Ofwat is not prescriptive about how consultees should engage with it and employs flexible approaches, recognising differing levels of resource. Ofwat publishes impact assessments and all consultation processes. It also consults publicly on its annual Programmes of Work, generally asking stakeholders whether it is focusing on the right priorities (see [www.ofwat.gov.uk](http://www.ofwat.gov.uk)). It states that changes result from this process – ‘we’ve adjusted timetables



and outputs from time to time'. Ofwat also points out that consultees may be asked to respond to two different organisations on what they may perceive as the same policy. 'It is the central government department that owns the policy (in our case Defra), and they may well be doing an IA and a consultation on that, while we're also out consulting on implementation. We need to be mindful of the burden being placed on the regulated party in that situation'. It is an important point in relation to regulators - that the ideology of the policy is not within their remit, but modes of implementation and subsequent management of the process are. The separation of agendas 'can occasionally lead to tensions between the BRE and the independent regulators; they don't always talk to us early enough in the process and the line is not always clearly defined between the policyowners at the centre and the independent regulators. We're not just here to do the Government's bidding'.

According to BERR officials, they see their remit as primarily consultation with industry and unions – 'there are different forums for consumers, they're mostly handled directly by the regulators'. This situation can be contrasted perhaps with policymaking in Ireland where community and voluntary organisations are represented in the core Social Partnership forums.

BERR acknowledges that consultations are often undertaken with an 'eye to putting things on the record – we're also fulfilling freedom of information (FOI) requirements'. The Department also states that it often 'thrashes out basic parameters with CBI and unions' and then puts proposals out for general consultation, when 'there are still a lot of variables around the implementation mechanisms'

As the Better Regulation agenda has matured, according to BERR, the process has moved to from 'the strategic to the delivery phase' and is now concerned with better policymaking. This new phase is centred on culture change strategy and training for the whole department to ensure implementation. Stakeholder engagement is happening – 'at the top level, with senior officials and senior staff of TUC, CBI, IoD etc' – with an 'ongoing conversation about what's going on and current issues'. Specific projects (such as Simplification Plans) also have their own targeted stakeholder and communication plans at local level.

The Department of Children, Schools and Families ([www.dcsf.gov.uk](http://www.dcsf.gov.uk)) said that it puts a great deal of emphasis on 'prior' work with key stakeholders in development of policy proposals – 'it's often too late by the time we go out to public consultation.' It has created a number of forums and tools to engage with its key stakeholders – including 24,000 schools. These include a Customer Insight Group and an Implementation Review Unit within the Schools Directorate. This latter group comprises 12 frontline practitioners, chaired by a well-respected headmaster. This panel is very important to the work of the department's own internal Better Regulation Unit. They look at all early proposals and provide tests. Meeting every two months, policy officials are required to present their plans to this external group. The Department also operates an email service to all 24,000 school heads that keeps them informed of developments and thinking within the Department. There is a parallel head teachers' Feedback Service (which does not always work as effectively as might be hoped). This Department places importance on option appraisals (including unpicking the do-nothing option to assess whether government intervention is necessary or desirable) and also takes account of the Chief Economist's comments on all early-stage proposals.

Ofcom may be considered quite entrepreneurial and innovative in its approaches. Set up in 2004, it has a statutory duty (section 3 of the Communications Act 2003) to have regard to the principles of



Better Regulation, to carry out Impact Assessment, to consider alternatives to regulation (including self- and co-regulation) and to consider good regulatory practice as it evolves. At Ofcom's inception, its Board decided to set out what these high level duties might mean in practice. The key regulatory principles it set out are that a) there is a bias against intervention and b) where it is necessary to intervene, Ofcom will always choose the least intrusive model. This, its officials claim, force the organisation to think alternatively and creatively about how it does things. Added to this is a clear commitment to consultation and a statutory duty to have regard to the interests of consumers and citizens. In common with every regulator and central government, there is also a duty not to impose unnecessary regulatory burdens and to remove burdens that have become unnecessary. The annual publication of what are known as Simplification Plans set out the achievements and compliance with that duty. Ofcom's most recent (November 2008) Simplification Plan makes a distinction between regulatory burdens (i.e. the costs of regulation) and administrative burdens (more commonly known as red tape). It considers the former to be of greater importance than the second.

According to Ofcom officials 'we try look at Better Regulation in the round'. The organisation's Consumer Panel has developed a toolkit, designed to check that the regulator is, in fact, reflecting consumer interests. It asks Ofcom to identify what the consumer interest actually is, for any given issue, and to make these explicit in all publications. This toolkit has been used not only to help in policy development, but also to review Ofcom's performance. It is understood that the European Commission has expressed interest in this toolkit which may have uses for other regulatory bodies. A number of standing committees advise Ofcom on an ongoing basis. It has an internal Consumers and Citizens Steering Group (in addition to the external Panel) and a Citizens, Older and Disabled Users advisory committee (external).

In some instances, Ofcom's various committees and panels have initiated action. For example, current regulation on broadband internet service providers was kick-started by the Consumer Panel which advised that there were real problems for consumers (with providers promising certain speeds but actually delivering less, once the consumer had signed up). A voluntary Code for the industry was devised by industry with Ofcom, designed to provide better information to potential purchasers before they buy (see [www.ispa.org.uk](http://www.ispa.org.uk)). Ofcom will undertake ongoing research to identify what speeds are actually being delivered and industry will take responsibility for publishing this research. That said, in earlier times, Ofcom encouraged providers to produce a voluntary Code on marketing generally. This, however, did not work well and a much more mandatory Code is now in force. According to Ofcom, industry is actually happier with a mandatory Code, as it 'creates greater clarity for them'. This reinforces a point made by an Irish environmental official who stated that industry wanted mandatory enforcement procedures to 'root out the bad guys', where self- or co-regulation may not have been perceived as having sufficient 'teeth' to deter non-compliance.

Ofcom's approach to consultation is as follows: First, it publishes a Terms of Reference around a given issue and seeks comments on that. This involves 'continuous engagement' with stakeholders. The second step is to scope out the project (before options are developed or offered). This phase involves 'continuous engagement' with stakeholders'. Then, consultation is embarked upon, centred on 'some preliminary options' and finally proposals are worked up and these, too, are put out for consultation. (cf current work on the development of spectrum policy for Next Generation Broadband involved giving industry a framework document setting out the principles

of what Ofcom hopes to achieve) Summaries of responses to consultation and outlines of proposed action (including showing changes) are always published (see [www.ofcom.org.uk/consultations](http://www.ofcom.org.uk/consultations)).

Changes (and even new options) emerge from consultations. Ofcom cites an impact assessment it undertook into the effects of TV advertising on children. Originally it consulted on three options but also asked for ideas. Following widespread public debate, a fourth option emerged (extending the time period that the ban would apply). This direct engagement with citizens on a public policy issue has been praised in a recent review of impact assessments carried out by the NAO. Ofcom sees citizen engagement as key to ensuring legitimacy.

Imaginative use of technology is deployed. Ofcom has set up a blog on Public Sector Broadcasting and another for its current review of the mobile sector. It also produced interactive online executive summaries of consultation documents that are useful for individuals or organisations that may not have the resources or expertise to work through the full (often highly technical) documentation in a consultation process.

Research is a key tool for Ofcom as an evidence-based economic regulator. In addition to substantial research (published) on the various markets and international comparators, it also undertakes extensive consumer research and publishes an annual report called *The Consumer Experience*. Alongside this, Ofcom also publishes a policy document that states the research findings and sets out what the organisation intends to do on foot of this. When policy statements are produced, Ofcom asks readers to respond, stating the three main outcomes they hope to see emanating from decisions. Ofcom also undertakes deliberative research, using citizen juries. These are asked to make appropriate trade-offs – for example, ‘yes, we could ban all food advertising aimed at children, but this would mean less funding for children’s TV – please suggest solutions’.

Ofgem is another organisation that confirms ‘considerable work goes on before formal consultation’. It operates a Consumer Panel and says it ‘gets a lot of input from them’. Ofgem says that it focuses extensively on trying to identify what the consumer interest is, in relation to any proposals. It does not take a fixed view on how best to implement projects. Citing two recent major undertakings (RPI-@20 and the Lens project on electricity distribution, see [www.ofgem.gov.uk](http://www.ofgem.gov.uk)), officials said that Ofgem is ‘very much scoping out models, suggesting different scenarios, not dictating what the outcome will be. We are very much looking for inputs’. Ofgem commented that formal public consultation ‘is really designed to support transparency – itself very important too – but a good regulator should already have a pretty informed view before going public.’ It attaches importance to openness throughout any regulatory decision-making process, especially with complex licensing processes ‘where you should consult on drafts as you go along’. Ofgem uses workshops to engage stakeholders and finds them ‘effective to the extent that people are willing to engage; sometimes, unfortunately people rehearse their positions – it’s our job to convince them that we really have an open mind and are listening’. Like Ofcom, Ofgem is also commissioning more and more research.

Interviews with the Department of Health show some success with engaging stakeholders in joint problem-solving, under Better Regulation precepts. The Department points out that, with such a large and complex area as healthcare, the range of stakeholders is diverse. It tailors consultations accordingly, as not all are interested in, or affected by, particular policies or regulatory initiatives. It describes three models of consultation. 1. Large, public consultations that often generate significant public debate (e.g. Lord Darcy’s Next Stage Review of the NHS

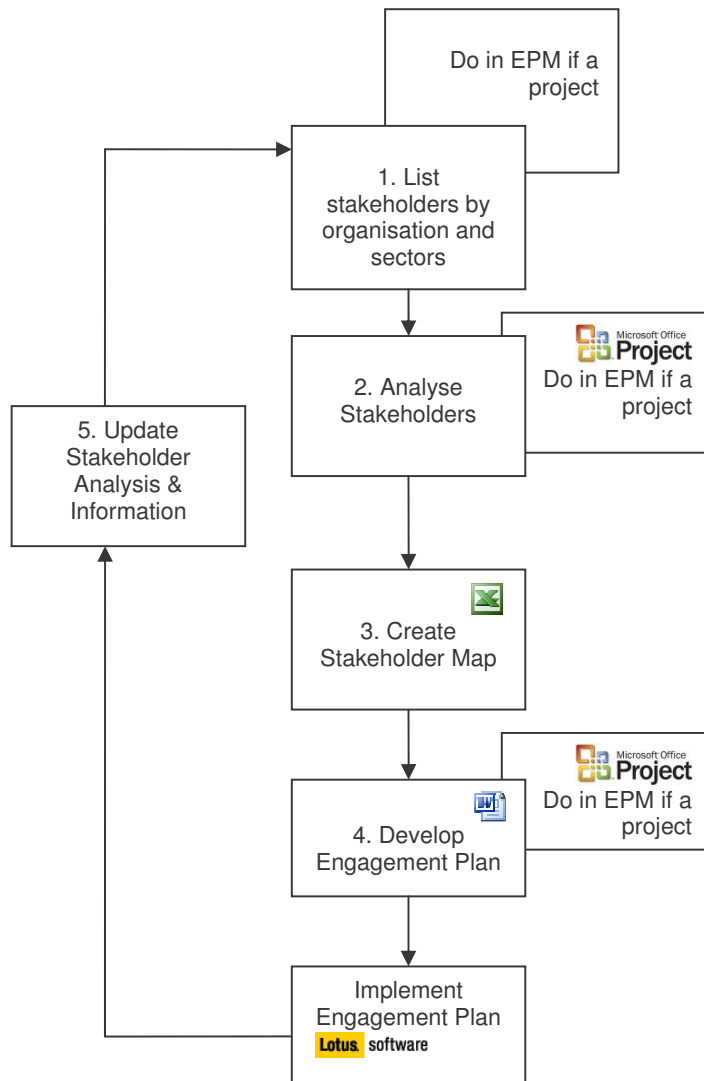
([www.ourhns.dh.gov.uk](http://www.ourhns.dh.gov.uk)), the smoking ban etc); 2. Consultations with professional bodies, which usually tend to centre around changes to regulatory structures, Codes of practice etc and 3. Technical Consultations, which are detailed medical consultations with the professions on issues like changes to medical equipment, devices or procedures. This last type is usually carried out on behalf of the Department by arm's length bodies such as the NHRA and sometimes the Institute for Clinical Excellence. According to the Department, about a quarter of all issues ends up in formal public consultation, three quarters are resolved via background consultation with the appropriate bodies. On wider public consultations, the department taps into the expertise of the government's Central Office of Information, which provides recommendation on different consultation techniques to use. The Department has experimented with postcards, locally organised events and workshops (but has not yet experimented with new technologies). It cites the recent public health White Paper – Your Health, Your Care, Your Say as a good example of citizen-level engagement ([www.dh.gov.uk](http://www.dh.gov.uk)).

There is awareness of legal obligations to consult and 'tight' links to departmental solicitors. On one occasion, the Department has had to re-consult five times on a particular issue because it was found to have run ineffective earlier rounds. Occasionally, the legal obligation to consult (especially at local level) has given rise to problems – for instance where formal public consultation is undertaken before informal discussions have taken place with key stakeholders. The Department has, conversely, been criticised in the past for lack of transparency but it still emphasises the overriding importance of its key stakeholders and continuous engagement with them. Failure to conduct robust impact assessment or to provide adequate supporting documentation as part of the consultation also provides a legal basis for judicial review of departmental processes – a fact of which officials are well aware.

In an interesting insight, the Department says that it is most likely to go to public consultation where it either fails to gather sufficient evidence, or where early inputs (from key stakeholders and experts) are contradictory in nature. At the same time, 'where we often get a lot of opposition to a proposal, we will tend to rely on the advice of professionals and experts'. The Department also grapples with tensions between FOI and data protection issues. 'What do we do with consultees who don't want their responses put into the public domain? Have they already stepped into the public domain simply by responding to a consultation?' Officials are trying to establish precedents in this area, with a case currently going through the Information Commissioner. Finally, in common with departments everywhere, they struggle with differentiation between lobbyists and stakeholders.

Given a complex network of stakeholders, the Department has worked hard on mapping its stakeholders according to their importance and their relevance to various issue areas. Part of this mapping work includes signposting systems to identify the effect of proposals on other arms of government, with a requirement to give other departments the opportunity to comment. Detailed internal structures have been established to manage those relationships, alongside production by the department's internal Better Regulation unit of extensive guidelines and checklists for stakeholder engagement by policy officials.

## Department of Health Guidelines:



Source: internal Department of Health document

## Stakeholder and Relationships Strategy

Annex A

European FP6 – Integrated Project

Coordinated by the Centre for Philosophy of Law – Université Catholique de Louvain

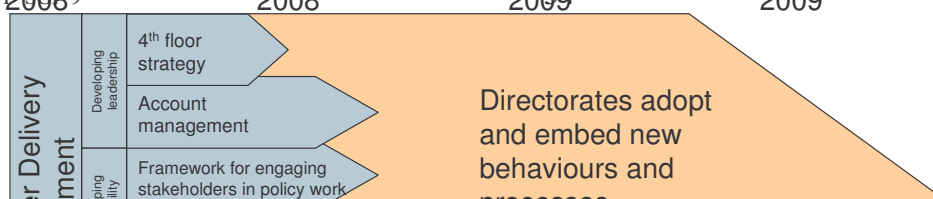
Mar 2008

Sept 2008

Mar 2009

Sept 2009

Mar 2010



*Source: Internal Department of Health document*

A senior sponsor within the Department is appointed to manage each one of the 50 most important stakeholders (see Appendix II). This was intended to prevent situations where a single stakeholder might be targeted several times a week by different officials seeking advice or inputs. There is also a Senior Stakeholders Forum that meets three times a year. However, it still appears that some stakeholders may still be marginalised, depending on the commitment and proactivity of individual policy officials.

One interviewee, while acknowledging that ‘all the real work happens in the proposal development phase’, suggested that it is common that there are no standardised procedures for managing interactions with external stakeholders, nor the information obtained. The participation of stakeholders is often ‘idiosyncratic, informal, disorganised and dominated by organised interests’. He noted that there is work underway in the Netherlands to create a hierarchy of consultation procedures, specifically aimed at bringing greater transparency into the earlier proposal development phase. At the same time, the very informality of the early phase can facilitate reflexivity and learning – and ultimately better policymaking. As Michael Murray (article in *The Economic and Social Review*, 2006) suggested, the institutional arrangements really do matter. He argued that without recognition of the asymmetrical way in which decision-making power is distributed, terms such as ‘public consultation’, ‘participation’ and ‘social inclusion’ can ring hollow. We could add stakeholder engagement to that trio of terms. In reality, issues such as capacity-building measures, exploring and identifying the parameters by which representation through stakeholders is acceptable and a clearer definition of anticipated outcomes from both deliberative and wider consultation processes – particularly insofar as whether it means inclusion in final decision-making – remain to be addressed. This is really at the nub of the core problem of



fitting Better Regulation into a model of reflexive governance, in our view. The UK has to an extent recognised these issues at one end of the spectrum, in the latest refinement to its Code on Consultation; however, the issues are not well-addressed yet at the level of stakeholder engagement in the key early stages of policy development. Clearly, this is where the greatest scope for influence exists, and where, in fact, listening and learning takes place. However, there is both a lack of transparency around the engagement mechanisms and processes and wide variety across Government in practice.

The Department of Health cites the establishment of the Healthcare Inspection Concordat ([www.concordat.org.uk](http://www.concordat.org.uk)) as an example of innovative, collaborative problem-solving in conjunction with stakeholders. In this Concordat, a range of regulatory agencies (now numbering 20) are trying to better co-ordinate their activity, in order to reduce the burden on frontline staff. At a minimum, they have successfully adopted co-ordinated scheduling of inspections, so that hospitals (for example) are not simultaneously hit in a single week with inspections on health & safety, food quality, hygiene and clinical care. A Provider Advisory Group (representing the targets of inspection) was established to work with the Concordat and input into development of strategies. In establishing the Concordat, the approach has been about building relationships and learning from one another, according to the Department of Health. Where there had been initial suspicion and lack of trust, the principle of a voluntary collaborative approach has helped to overcome early difficulties (better than had a legal requirement forced the agencies to work together). The Department acknowledges that this had been a pragmatic decision though, as not all the agencies were, in fact, under the direct control of the Department! This initiative appears to be working well and the Concordat concept is seen as a role model and is permeating outwards, with the Higher Education sector about to adopt the model. Meanwhile, the Healthcare Concordat itself is now debating different regulatory philosophies and, more than simply co-ordinating their inspection schedules, there has been a rationalisation of total inspections and greater efficiency has resulted. In a further development, regulators now regularly get together in local Risk Summits to work out inspection priorities in partnership. Concordat, it was said, has had its greatest successes where there is a commonality of purpose, i.e. ‘the more finely-tuned the discussion topic, the more likely you are to get an agreed – or an innovative – solution’.

### 3.5 Oversight Measures

The UK approach to embedding Better Regulation has been to create a dedicated unit in every government department. The central unit (located now in BERR), acts in support, offers advice, cajoles and persuades. As one BRE official expressed it, however: ‘We’re the bane of their lives and the least popular phone call’. However, this emphasis on spreading the message across all areas can be distinguished from the Irish approach which is more centralised, with only the Department of Enterprise, Trade & Employment so far establishing a Better Regulation team or unit. That said, BRE highlights differentiation in the resources allocated to the various departmental units. The relative seniority of these officials within their own departments may also be relevant. There is also a consultation co-ordinator in every department, whose job it is to advise policy leads on best practice consultation and compliance with the new Code of Practice on Consultation (2008). Finally, all government departments and regulatory agencies are obliged to produce ‘Simplification Plans’ which track and record progress on the Better Regulation agenda. The most recent round of Simplification Plans were published in December 2008 and all are available on the relevant department’s or agency’s websites.

BERR does not operate citizen juries but it has two significant panels which may contribute to reflexivity. First of these is a Ministerial Challenge Panel (MCP). Chaired by the Minister for BERR, this forum comprises CBI, TUC, the Federation of Small Business, BCC and EEF, the National Consumer Council, Consumer Focus (a new group which amalgamates a number of previous bodies), individual entrepreneurs and a couple of other departments. The remit for this group is to challenge BERR's policy agenda. Officials are brought in regularly to present on early-stage policy plans and the main inputs usually relate to challenges against particular policy routes or approaches and suggestions for alternatives. At a lower level, the Programme Board (again composed of external members) is designed to ensure that the Better Regulation programme itself is meeting agreed objectives and targets, in other words is BERR delivering on Better Regulation structures etc?

Unlike BERR, the Department of Health does not operate a Challenge Panel (the universe of stakeholders and policy/issue areas is thought to be too diverse), nor does it have a Consumer/Users Panel nor citizen juries (unlike, for example, Ofcom)

The Department of Health's Better Regulation Unit also acts as a gateway for all consultation documentation – nothing can go out for consultation unless it is approved by the Unit, which sees its main role as ensuring that policy officials adhere to the Government's (2008) Code of Practice on Consultation. That said, the unit frankly admits that performance across the Department is patchy. 'In places, we're very effective at how we manage consultations, the content of proposals is thorough and has been co-designed with stakeholders, there is scope to influence and notice is taken of responses. In other cases, we're definitely guilty of rubber-stamping'. In relation to transparency, the Department has set itself a target of publishing 75% of feedback and responses to consultation within 12 months. It always publishes a summary of responses, including a question-by-question analysis of responses wherever it has put out questions. In common with other interviewees in Britain, this Department states that the clear government-wide focus on evidence-based policymaking not only is widely accepted, but it dictates that robust procedures be put in place to ensure transparency around decision-making. 'if we get contentious responses to a consultation, we need to be able to explain why we have gone down a particular route, and not others'.

On impact assessment, the Department of Health's gatekeeping Better Regulation Unit admits also to patchy quality across the department. There is a tendency to resort to partial impact assessment where officials feel sufficient evidence has not been collected and it is hoped to gather more on the way. Post-implementation reviews or ex-post impact analysis are not undertaken (in contrast with the approach being adopted by organisations such as Ofcom). One of the reasons cited was that 'policy officials change responsibilities all the time'.

The Home Office's Better Regulation unit suggested (mirrored in many departments) that it does not track policy ideas per se, or attempt to measure to what extent the proposals may have changed as a result of consultations. This is considered a matter for the policy officials involved, who would then advise Ministers. The Better Regulation Unit concentrates on the processes and ensuring compliance with the Code of Practice on Consultation and that comprehensive impact assessments are produced.. Impact assessments are carried out by policy leads with the support of in-house professional economists. Where significant security issues are involved, it is not always possible to put all the relevant information into the public domain and the department is acutely

conscious of fine lines between privacy and transparency trade-offs. The Chief Economist examines all impact assessments for robustness (before they are formally submitted to Ministers for signature).

One of the key findings has been the perhaps unintended consequence of establishing a Better Regulation unit within every government department. This was certainly meant to embed Better Regulation awareness, principles and practice across government. In fact, what may be happening is that individual policy leads tend to leave all the consultation and impact assessment to the internal unit and do not, themselves, take ownership. This can mean that those carrying out consultations and managing IAs are not necessarily familiar in depth with the issues and, moreover, are not the people involved in earlier consultation with key stakeholders. By the time a proposal is 'ready' to be put out for public consultation, much of the important inputs may well already have been gathered and the Better Regulation team is not involved in that process. Tellingly, an official with the internal Better Regulation Unit of the Department of Children, Schools and families said: 'Making better policy is not our job. Better Regulation is about reducing red tape and creating less bureaucracy. The quality of the regulation itself is not our concern. If a decision is made to have children jump up and down every morning before school, we are interested only in creating a simple means for schools to complete forms that report to us this is being done – not whether it is a good idea or not'

The size and diversity of UK government and its stakeholders contributes to this distancing. It is certainly easier for Irish civil servants to manage their relationships, but it is also perhaps important that policy officials themselves undertake the Better Regulation activity and so there is perhaps better co-ordination of this activity with more general policy development and stakeholder engagement, at least in theory.

The Government has also committed to undertaking regular reviews of sectors and the impact of particular regulatory systems. These are handled independently by individuals or committees/taskforces set up especially for the purpose on each occasion (a permanent structure for undertaking such work like Australia's Productivity Commission does not exist). One example of a recent such review was the Killian/Pretty review of the planning application process (November 2008, [www.planningportal.gov.uk](http://www.planningportal.gov.uk)). Commissioned in response to complaints from small business for many years, the report was published in November 2008 and set out recommendations for a faster and more responsive process.

### **3.6 Reflexive Governance and Innovative/Effective Regulation**

Two major innovations have recently emerged as the Better Regulation sector matures. The first of these is the new regime of regulatory sanctions proposed in the 2006 McCrory Review of Regulatory Penalties. The proposal is to create more flexibility in the determination of appropriate sanctions, recognising that heavier penalties (i.e. costs of non-compliance) should attach to repeat or persistent offenders, whilst lightening the burden for occasional or 'accidental' transgressors.

The proposal would also give court-based sanctioning powers directly to administrative public servants, i.e. those with a supervisory or monitoring role.

The second significant development in Better Regulation is the very new concept of regulatory budgeting. Still in outline proposal form and as yet, not agreed by government, this concept recommends that each government department have a set (costed) budget for the amount of new regulation it can introduce in a given period. This proposal has been developed in recognition of the costs to business (especially small businesses) of adapting their own processes to meet new regulations. Confining departments' activity in creating new regulation, and forcing them to quantify the additional cost burden they are creating, is thought to be a further, nuanced step in reducing burdens for business. The opportunity would also exist to create more 'headroom' for new regulations, if deemed necessary, but only if existing, older regulations can be retired. However, it is acknowledged that a system of regulatory budgets will be complicated to implement, not least because departments can do nothing about EU regulation imposed. And should a major policy priority such as climate change be taken out of the equation altogether? These issues are not yet resolved. In fact, we hardly found one individual outside BRE willing to advocate regulatory budgets. Some (including regulators, academic commentators and observers in other jurisdictions) were very critical of the proposal. However, the CBI is strongly in favour and a decision (following its 2008 consultation, see BRE website) is awaited from the Government.

In a further (and not unrelated) innovative step, Better Regulation is now extending to consider burdens on frontline public sector staff. There are some logistical difficulties with this, however. As one BRE official put it: 'Are we looking at manpower – how many hours does a policeman spend filling out forms; or is it about actual financial costs to the public service of implementing new regulations?' Considerable work is currently underway to review and analyse data-streams in every department. Again, the application of cost/benefit-based methods is raising issues – 'are we to examine actual total numbers of data-streams, or just think about getting rid of the ones that are most burdensome, in the sense of taking up the most time?' The research going into this process across every department is impressive. However, as another official observed: 'It can be difficult and time-consuming in itself to track down the relevant frontline staff and find out about the administrative burdens'. BRE argues strongly that this activity shows that Better Regulation is not, in fact, solely focused on business. In fact, the target for burden reduction on frontline public sector staff is higher – at 30% currently – than the 25% target set for business. It is claimed that the differences in relation to quantification and burden measurement for the public sector makes this work less visible or tangible than the higher-profile activity for business interests. However, BRE also acknowledges that success to date has been 'a bit patchy', with some departments only 'aspiring to 20% (the Home Office was cited in this context), and others already working on 30%'. However, as the Home Office itself points out, Home Office Permanent Secretary Sir David Normington's review on 'reducing the Burden on Police in England & Wales' has since shown that the Home Office anticipates achieving reductions in the data burden by up to even 50% or more (see <http://police.homeoffice.gov.uk/publications/police-reform/data-burdens-review.pdf>).

The Department of Health is applying qualitative assessment of burdens, others are counting numbers of data-streams. Some departments are doing good work in setting up forums where frontline workers can have a voice and discuss bureaucracy in the workplace (as required by the new programme), 'but others are just paying lip service'. In another turn, BRE mentions difficulties with the government's system of inspections as presenting a 'burden' for public sector workers, which is, however, unrelated to data-streams. For example, a hospital might find itself the

subject of several different inspections – one for quality of care, one for health & safety and yet another for food hygiene or quality. They might prefer a more joined-up approach where one regulator is responsible.

Although more research is required, initial impressions are that alternatives to regulation seem to be most seriously considered by independent regulators like Ofcom and Ofgem, although, again we need to be mindful of the political environment in which central civil servants work, where Government's programme and Ministerial priorities will always dominate the agenda. One observer, commenting in relation to Better Regulation practice in the US, said that 'serious consideration of alternatives would happen much more routinely if judges were more active about finding that failure to do so invalidated the impact assessment'. Given that decisions in Britain have failed judicial review for inadequate or poor consultation processes, it seems possible that the same development could apply here regarding consideration of alternatives.

In relation to consideration of alternatives to regulation, the Home Office pointed to the voluntary Code on the sale of alcohol (contained within the Violent Crimes Reduction Act, 2006). Government was willing to let industry self-regulate via this voluntary Code. The Home Office commissioned an independent review of the implementation of the Code in January 2008. This revealed a disturbing level of irresponsible and harmful practice in significant sectors of the industry, along with limited evidence of social responsibility. The Government is therefore currently considering the case for the introduction of a set of mandatory conditions to improve the retail of alcohol. (See [www.homeoffice.gov.uk/documents/cons-2009-alcohol](http://www.homeoffice.gov.uk/documents/cons-2009-alcohol))

When asked about joint government/stakeholder approaches to problem solving, officials responded by saying that the different ways in which a proposal for new regulation might arise are as follows:

- Events – e.g. the credit crunch – clear evidence of market failure
- Ministerial priority – 'something must be done about 'x''
- Public pressure (may be linked to previous point) – the Dangerous Dogs Act of 1991 was cited as an example of an extremely poorly thought-out, rushed response to public pressure with little attention paid to consultation or co-design of solutions
- Identification of a policy need – in the words of a senior BERR official – 'we're always looking for evidence of market failure. Without that, we're slow to act'
- European legislation: It was said that the pressure of a heavy EU legislative programme may sometimes mitigate against the possibility of offering too many regulatory alternatives (e.g. soft tools like self-regulation)



## 4. Australia

### 4.1 Culture and Administrative History

In this paper, we consider principally developments at the national (Commonwealth) level and also some aspects of the processes followed in Victoria and, to a lesser extent, NSW. Some key differences can be discerned – not only between the different levels within Australia, but also as compared with other jurisdictions such as the UK and Ireland. However, this cannot be read as a comprehensive analysis of all current developments in regulatory reform within Australia.

The Better Regulation agenda in Australia has not generally used the same nomenclature as in the UK or Ireland. It has evolved from similar circumstances though. Several waves of regulatory reform have been undertaken since the 1980s principally with the aim of improving Australia's competitiveness. The first of these, under the Hawke government of the early 1980s, was marked by substantial reform of financial markets (including deregulation), the floating of the Australian dollar and rapid reduction of protective tariff barriers to free trade. The second wave of reform was carried out during the Hawke and Keating governments of the later 1980s and early 1990s, under the auspices of the Council of Australian Governments (COAG). There were two major elements to this wave. First, the several hundred reviews of existing legislation and policy under the National Competition Policy (NCP) (see [www.aph.gov.au](http://www.aph.gov.au)), which focused on policy content and a second prong relating to reforms of the processes for regulation, with the aim of ensuring that future regulation would not be subject to the same weaknesses that had prompted the NCP reviews in the first place. The third wave of reform started in 2006 and is usually referred to as the National Reform Agenda ([www.coag.gov.au](http://www.coag.gov.au)). Again driven by COAG, it has been enthusiastically adopted by the Rudd Labour Government elected in 2007.

As in other jurisdictions, pressure from the OECD is evident in the early political commitment to microeconomic reform. As early as 1986, a number of special purpose regulatory review units were created at state and federal level, with the Victorian Government emerging as an early leader. The Commonwealth's Business Regulation Review Unit (BRRU) was established in 1986; Prime Minister Hawke emphasised the need to reform regulatory processes and to reshape economic institutions in policy speeches in 1987 and in the same year the Industries Assistance Commission (now the Productivity Commission) was transferred to the Treasury portfolio under Paul Keating. The Commission had begun by then to emphasise the inefficiencies that resulted from government regulation at both state and federal levels and it made regulatory reform the centrepiece of its 1988 annual report. It argued that the then poor performance of the Australian economy was due to excessive protection and too much inappropriate regulation. In turn, these ills were the responsibility of vested interests who 'sought preferment at the expense of the wider community'. The report also drew attention to the difficulties of coordinating reform in a federal state where much constitutional authority for business regulation lay in the hands of the states. (IAC 1989)

Following this, a new body, the Industry Commission was established, incorporating the old IAC, together with the BRRU and the Inter-State Commission. Political support for reform came with the creation of COAG, which was designed at least in part as an institutional mechanism to cope with the demands of widespread regulatory reform, itself acknowledged as important in improving national efficiency and international competitiveness. New intergovernmental bodies were created – the National Food Authority and National Training Authority, for example; the series of reviews

under the National Competition Policy were commissioned (the Industry Commission being charged with undertaking these) and the Commonwealth's processes for making regulations were strengthened with the introduction of the regulatory impact statement (RIS) process.

The Howard government of the 1990s continued with the reform agenda, focusing initially on reducing the regulatory burden on small business. Later Howard governments freed up labour markets and addressed industrial relations. By the 2000s, the major NCP reviews were largely complete (Productivity Commission 2005), the process reform based around RIS was implemented by the Commonwealth Government in 1996-98 and various separate large-scale reviews of individual sectors and regulatory issues continued under first the Industry Commission and later the Productivity Commission.

Three seminal reports have influenced current policy on regulatory reform and the current National Reform Agenda. The first of these was the Productivity Commission's 2005 assessment of the NCP reforms (echoed also in a slightly earlier paper on the subject by its influential Chairman Gary Banks, [www.pc.gov.au/speeches](http://www.pc.gov.au/speeches)) and the second was the Victorian Government's 2008 'Shared Future' project (see [www.dpc.vic.gov.au](http://www.dpc.vic.gov.au)) which emphasised the need for national coordinated reforms in healthcare and education. This last added the need for reform to 'human capital' to the earlier drives for microeconomic reform.

In 2006, COAG announced its National Reform Agenda, focusing on three prongs – human capital, competition and regulatory processes. The Taskforce on Regulation (chaired by Gary Banks) released its enormously influential report 'Rethinking Regulation' on reducing the burdens on business in the same year. Virtually all of that report's recommendations have since been adopted by the Rudd government, in particular the six principles of good regulatory process identified in the Report. In addition, a further impetus for the development of Better Regulation practices has been the current Government's clear espousal of evidence-based policymaking. It was noted by one interviewee (echoing comments elsewhere) that a strongly evidence-based approach can act as a counterweight to the influence of powerful sectoral interests.

It can be seen from this short history that OECD influence in the reform of regulation and regulatory processes has been less direct in the Australian case, as compared with Ireland, for example, although still important. Much of the pressure for reform has been internal, politically supported by different governments but all driven by the recognition of a need to enhance competitiveness and economic performance. In this respect, the Australian experience mirrors that of other countries. Key differences have emerged, however, many of which (but not all) pertain to the constitutional structures and variations in application between the Commonwealth and individual state governments. This is an important point. There are many variations in the application of regulatory practice between the various levels of government in Australia, rendering it occasionally difficult to speak of an 'Australian' approach. It was noted by many interviewees that Australia's federal structure creates additional problems for larger organisations when there is inconsistency between states' regulations or even between their implementation of the same regulation. It is for this reason that mutual recognition is such an important doctrine and that harmonisation is a key area of focus for government, notwithstanding the reluctance of some states. (According to some respondents, Victoria, for example, is apparently unwilling to harmonise other than at best practice, highest available standard level. However, others have pointed out that Victoria's position promotes best practice regulation, by resisting a drift to agreement around reduced quality, or Lowest Common Denominator (LCD) solutions).

According to the State Services Authority in Victoria, there are three stages to regulatory reform. It described the Australian experience – and particularly that of Victoria – as follows: Prior to the mid-90s, most emphasis was on ensuring that new regulation was subject to adequate prior review and this always focused on communitywide benefits. The focus from the mid-90s onwards turned more towards reducing burdens for business (especially administrative burdens), following similar patterns in the UK and the Netherlands. The most recent focus seems to be on what regulators actually do – a focus on the administration of new rules, rather than their development. This leads to consideration of whether the institutional structures are optimal. The SSA notes, for example, that the Hampton Review in the UK resulted in significant consolidation of regulators and the SSA is now working on a similar project in Victoria.

The Chairman of the Productivity Commission has long argued that it is not regulation, per se, that is bad, but how it is implemented and that good regulatory processes are the fundamental building block. Recent efforts have clearly focused on this aspect (such as the establishment of the OBPR with a clear evaluative/oversight role in determining the adequacy of RISs at Commonwealth level), but Australia still represents a fragmented approach and the quality of application of those processes varies both between jurisdictions and between arms of government.

In comparison with recent trends in the UK, particularly, the Australian Productivity Commission views issues such as ‘one in, one out’ and regulatory budgets as ‘blunt instruments’ and claims that the approach in Australia is more ‘subtle’, trying to achieve better quality regulation. This is perhaps best expressed in the words of Minister Lindsay Tanner who has defined productivity as ‘maximum wellbeing’.

## 4.2 The Commonwealth Government Level

The terminology used at federal or Commonwealth level is that of ‘best practice regulation’, not Better Regulation (see [www.obpr.gov.au](http://www.obpr.gov.au)). At this level, the regime is characterised by six key principles as follows:

- governments should not act to address problems until a case for action has been clearly established
- in acting, governments need to consider the costs and benefits of a range of feasible policy options, and then select the one that provides the greatest overall net benefit to the community
- effective guidance should be provided to regulators and regulated parties about the regulation’s policy intent and expected compliance requirements
- there should also be mechanisms to ensure regulation remains relevant and effective over time
- there should be effective consultation with regulated parties at all stages of the regulatory cycle

The salient features of the process are set out in the Best Practice Regulation Handbook published in August 2007 (see [www.obpr.gov.au](http://www.obpr.gov.au)). A preliminary assessment must be undertaken for all regulatory proposals to establish whether a full RIS is required. Any proposal likely to involve

medium business compliance costs must then have a full quantitative assessment of such compliance costs undertaken, using the specially developed Business Cost Calculator or equivalent mechanism. Proposals likely to have a significant impact require even greater analysis, to be documented in a RIS. Compliance with the procedures outlined in the Best Practice Regulation Handbook is mandatory for all Australian government departments, agencies, statutory authorities and boards involved in any way with regulation – including not only ‘black letter law’, but also quasi-regulation such as rulings, guidance notes and standards. Further, the Guidelines established a whole-of-government policy on consultation that sets out principles for best practice consultation with stakeholders.

Under the processes in the Best Practice Regulation Handbook, all departments and agencies are required to publish an Annual Regulatory Plan (ARP) in July of each year that essentially constitute public listings of upcoming regulatory activity including planned measures and upcoming reviews.

In December 2007, the incoming Labour government moved the Office of Best Practice Regulation (formerly known as the Office of Regulatory Reform) from its base within the Productivity Commission to the newly established Department of Finance and Deregulation, under Minister Lindsay Tanner. The OBPR carries out a similar role to the BRE in the UK or the Better Regulation Unit within the Department of An Taoiseach in Ireland. Its principal role is that of gatekeeper. It is responsible for assessing the adequacy of RISs and for certifying that compliance costs have been quantified. Proposals cannot proceed to the decision-making stage (Cabinet) until OBPR certification or assessment of adequacy has been received. In performing this role, the OBPR, like Better Regulation gatekeepers elsewhere, is concerned only with the standard of analysis undertaken and not with the merits of particular options or outcomes. Its independence and protection from any undue influence is strongly emphasised. However, it was noted in interviews with the OBPR that its home in the Department of Finance and Deregulation means that policy officials can and do sometimes comment on such issues during the RIS assessment process.

There is a network of Best Practice Regulation Coordinators with a senior officer in each department. Their role is principally to encourage and ensure compliance with the best practice regulation requirements, advise on how to conduct preliminary assessments and act as a first point of contact for policy officials undertaking RISs. They do not, however, undertake assessments or prepare RISs on behalf of policy officials. The Coordinators are required to report at six monthly intervals to the OBPR on compliance. The OBPR itself supports the Coordinators and offers formal training and coaching on RIS preparation, cost-benefit analysis and use of the BCC for policy officials involved in preparing proposals for the Australian Government and for COAG.

### **4.3 The COAG Level**

Following COAG’s promulgation of the National Reform Agenda in April 2007, Gary Banks, Chairman of the Productivity Commission noted (in a speech – see [www.pc.gov.au/speeches](http://www.pc.gov.au/speeches)) two key flaws (on both of which points the Commonwealth Government had taken the lead). The first was the lack of mandatory public consultation for COAG policies, particularly focused on the early stages ‘when opportunities to consider alternatives such as self- and co-regulation are still a

possibility’ and the second, the lack of oversight by an independent statutory body (a role the PC fulfils for the Commonwealth).

COAG issued (October 2007) a guide, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard-Setting Bodies* (see [www.coag.gov.au](http://www.coag.gov.au)). This guide notes that all governments will ensure that regulatory processes in their jurisdictions are consistent with the following principles:

- establish a case for action before addressing a problem
- a range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed
- adopt the option that generates the greatest net benefit for the community
- legislation should not restrict competition unless a) the benefits of the restrictions to the community outweigh the costs and b) the objectives of the regulation can only be achieved by restricting competition
- provide effective guidance to relevant regulators and regulated parties in order to ensure clarity of both the policy intent and expected compliance requirements
- ensure that regulation remains relevant and effective over time
- consult effectively with affected key stakeholders at all stages of the regulatory cycle and
- government action should be effective and proportional to the issue being addressed.

COAG has also strengthened its regulatory impact assessment requirements and the Guide states that ‘all governments will establish and maintain effective arrangements at each level of government’ through gatekeeping mechanisms, greater use of cost-benefit analysis ‘where appropriate’, better measurement of compliance costs through use of the BCC costing model and broadening the scope of impact analysis ‘to recognise the effect of regulation on individuals and the cumulative burden on business and, as part of the consideration of alternatives to new regulation, have regard to whether the existing regulatory regimes of other jurisdictions might offer a viable alternative’.

However, as far we can ascertain, Gary Banks’ second principal criticism of the National Reform Agenda, i.e. the lack of an independent statutory review/oversight body (see [www.pc.gov.au/speeches](http://www.pc.gov.au/speeches)) has also been addressed. COAG now has an oversight body – the COAG Reform Council and it also decides to refer matters to the Productivity Commission for review. Any recommendations are then implemented by the Commonwealth, as appropriate.

There are a couple of key differences between the respective Australian Government and COAG processes. In particular, under the COAG principles, a consultation RIS must be circulated to stakeholders.

OBPR’s role, as noted above, also applies to proposals being developed for COAG. OBPR publishes an annual Best Practice Regulation Report (see [www.obpr.gov.au](http://www.obpr.gov.au)) which in the first instance, reports on levels of compliance with Australian Government and COAG requirements for all proposals and across each departmental portfolio and cites the RISs that were deemed adequate or inadequate throughout the period. It also reports in detail on developments in regulatory reform in each of the states.



As a result of the COAG initiatives, the Australian states have all taken steps to establish Best Practice Regulation regimes. The following summary of recent developments in Victoria and NSW draws on the OBPR report for 2007/8 (see [www.obpr.gov.au](http://www.obpr.gov.au))

#### **4.4 Victoria**

Victoria (long considered by many commentators to be a leader in regulatory reform) has a comprehensive regulatory impact assessment process, including a statutory requirement to prepare a RIS where a proposed statutory rule is ‘likely to impose an appreciable economic or social burden on a sector of the public’ (Subordinate Legislation Act, 1994, see [www.ocpc.vic.gov.au](http://www.ocpc.vic.gov.au)). In addition to the RIS requirement, Victoria also (uniquely) has a requirement for a Business Impact Assessment (BIA) for primary legislation. Where any regulatory instrument results in a material change in the administrative burden imposed on businesses and/or the not-for-profit sector, the Standard Cost Model (SCM) is required to be used and the results of the SCM are publicly reported.

The Victorian Competition and Efficiency Commission (VCEC) is the independent assessor of RISs, BIAs and SCM reports. Similarly to the OBPR at the Commonwealth level, VCEC reports annually on compliance and adequacy of the impact assessments reviewed by it.

In addition, Victoria conducts an annual survey (the only one of its kind in Australia) on the performance of every Victorian Government business regulator. The most recent one, The Victorian Regulatory System (4<sup>th</sup> edition) was published in June 2008 (the next edition is due for publication May 2009). Containing information on regulatory developments and core operational and performance data for each of the regulators, it identifies areas of regulatory overlap or duplication, and of best practice (see [www.vcec.vic.gov.au](http://www.vcec.vic.gov.au))

The Victorian Government is specifically committed to reducing red tape (the ‘Reducing the Regulatory Burden’ initiative was announced in the 2006-7 Budget). It has set targets for reduction of 15% by July 2009 and of 25% by July 2011. The Department of Treasury and Finance releases six monthly progress reports ([www.dtf.vic.gov.au](http://www.dtf.vic.gov.au)).

In a role similar to that of the Productivity Commission in relation to national reviews, VCEC also carries out enquiries and reviews of regulation in particular sectors at the request of the Victorian Government. Recent reports have reviewed food regulation, building regulation, options for managing transport congestion, and the reform of the water supply sector (see [www.vcec.vic.gov.au](http://www.vcec.vic.gov.au) for documents and [www.vic.gov.au](http://www.vic.gov.au) for Government responses to same). Current enquiries cover environmental regulation and shared use of government facilities.

#### **4.5 New South Wales**

NSW appears to be a relatively latecomer to better regulation practices, at least compared with Victoria (for example, in 2007, the Business Council of Australia did not even include it in its annual Scorecard ranking of states’ performance on regulatory reform, acknowledging that the NSW government had only just begun to address deficiencies in its institutional structures and establish better regulation processes). However, in late 2006, NSW announced a new approach to Better Regulation, largely in response to a review of regulatory burden by the Independent Pricing

and Regulatory Tribunal (the independent economic regulator for NSW). Prior this development, however, officials say that the NSW regulatory framework had included elements of best practice and that reforms implemented on foot of the review ‘essentially strengthened and promoted greater enforcement of regulatory process requirements’. NSW established a Better Regulation Office within the Department of Premier and Cabinet in July 2007. This Office fulfils a gatekeeping role, again providing an annual review of the operation of regulatory processes in NSW.

Since 1<sup>st</sup> June 2008, all proposals are captured by gatekeeping and are assessed by the Better Regulation Office for ‘compliance with Better Regulation principles which include the need for impact assessment, consideration of a range of alternatives (including non-regulatory) and stakeholder consultation’. All ‘significant new or amending bills and regulations’ must be accompanied by a Better Regulation Statement (see [www.dpc.nsw.gov.au](http://www.dpc.nsw.gov.au)). The Government has appointed a Minister for Regulatory Reform whose responsibility it is to certify the adequacy of Better Regulation Statements and advise the Premier and Cabinet on whether regulatory proposals demonstrate compliance with better regulation principles. The Better Regulation Office, in addition to supporting the Minister in this work, also carries out targeted reviews of regulation in specific areas where reducing red tape will benefit the State’s economy. The NSW Government’s Guide to Better Regulation ( [www.betterregulation.nsw.gov.au](http://www.betterregulation.nsw.gov.au)) includes a whole-of-government consultation requirement and imposes a 28 day minimum for consultation with stakeholders during the regulatory development process. The Subordinate Legislation Act (1989 NSW) requires a RIS for all new principal statutory rules and imposes a public consultation requirement on any RIS prepared for a statutory rule.

Reviews have been conducted into the regulation of shop trading hours and the need for licensing of eleven occupations. Reviews have also been conducted into burdens on small business in the real estate, motor vehicle retailing, metal manufacturing and the accommodation, food and beverages sectors (see [www.betterregulation.nsw.gov.au](http://www.betterregulation.nsw.gov.au)). A number of current and pending reviews include one into plumbing and drainage regulation in NSW. The NSW Government has also committed to implementing the recommendations of the 2006 report of the Independent Pricing and Regulatory Tribunal on the burden of regulation and improving regulatory efficiency.

In 2006, the NSW Government also initiated an internal government review of the administrative burdens imposed on government agencies, which has led to reductions in the frequency of reporting requirements in some areas and streamlining arrangements in others.

The NSW approach does not mandate use of cost/benefit analysis (‘in the strict sense where a ratio is applied’), the Business Cost Calculator or the Standard Cost Model. Rather, the Better Regulation Office has released guidance material (Measuring the Cost of Regulation see [www.betterregulation.nsw.gov.au](http://www.betterregulation.nsw.gov.au)) to assist agencies and departments to quantify costs. This tool encourages users to consider all costs – including to the community, Government and economic impacts – rather than mandating quantification of ‘only a subset of impacts’. In relation to cost/benefit analysis specifically, the NSW approach is to quantify ‘wherever this is feasible and provide qualitative assessment otherwise’.

**Some Key Aspects of Regimes in Other States (for further detail and specific comparison-see Business Council of Australia’s annual Scorecard for Regulatory Reform, available at [www.bca.com.au](http://www.bca.com.au)):**

- Queensland does not have a formal procedure for reporting on compliance with RIS requirements. However, it is in the process currently of implementing a new regulatory reform agenda that will complement COAG's. Gatekeeping arrangements and impact assessment processes are being enhanced, with guidelines for best practice and improved consultation arrangements being prepared
- Queensland is committed to burden reduction and reports annually on the red tape stocktake
- South Australia requires that all Cabinet submissions include an assessment of 'regulatory, business, regional, environmental, family and social impacts'. Where the regulatory impact is significant, a RIS is required. If there are impacts on business, the use of the Australian Government's BCC is mandated (the first state to do this)
- In South Australia, it is the Cabinet Office that conducts assessments on the adequacy of RISs.
- South Australia has set a target to reduce red tape by 25% by July 2008; the Red Tape Reduction Programme is independently verified by external consultants
- Western Australia again does not employ formal reporting on compliance with its regulatory gatekeeping arrangements, although the Department of Treasury & Finance does advise Cabinet whether review and consultation requirements have been met
- Western Australia has a specific focus on small business, requiring a Small Business Impact Statement (SBIS) to accompany relevant Cabinet submissions. Regional Impact Statements are also required as appropriate.
- Public consultation is mandated in Western Australia where any newly proposed legislation or subordinate legislation is likely to restrict competition. Evidence of public consultation must accompany all Cabinet submission and the SBIS, in particular, must list all organisations consulted and indicate whether they were supportive or otherwise of the proposed legislation or regulation

## 4.6 Evaluation Measures

Interviewees at the level of national government cite a number of deficiencies in the practical operation of better, or best practice regulation. The Productivity Commission has been very critical of the quality of many RISs. In particular, there is a lack of robust quantification and inadequate or poor cost-benefit analysis. This has been partially attributed (by the PC Chairman, among others) to a relative dearth of comparative analysis of national economic and social data collection and research. The PC Chairman has recently highlighted the fact that policy evaluation in Australia is still often compromised by gaps in its data collection and a failure to best exploit the contrasting experiences of the States and Territories, notwithstanding the first-rate collection of statistical data by the Australian bureau of Statistics. Others have referred to a lack of economic expertise and particularly of econometric modelling skills within the civil service, which has led to extensive use (some, including the PC Chairman, argue over-use) of external consultants by government departments and agencies. The OBPR points out that the culture of preparing RISs and thinking in terms of cost/benefit analysis is still in the process of becoming embedded across the public service and that further education and acceptance is needed; that quality varies across departments principally due to whether or not policy officials have yet fully 'bought into' the concept and principles of better regulation. Although RIS has been around for 10 years, the current emphasis on best practice regulation and concomitant tightening of the rules on RIS preparation etc is fairly recent and there has been a great deal of change in the last two years. The political support (which

was cited as necessary to successful regulatory reform in the 2006 Taskforce on Regulation's Report) is now clearly evident in the persona of Minister Lindsay Tanner in particular, and in the parallel initiatives of the Australian Government and COAG, but efforts heretofore may have been less coordinated.

A distinguishing feature in Australia seems to be the wider scope of impact assessment. An OBPR official described it thus: 'While impact on business will always be the trigger for a RIS to be done, once it's underway, we will look at impact on the individual and on the community. We will be concerned with social, environmental and other elements'. This view was echoed also by Standards Australia and in Victoria by VCEC, the Department of Treasury & Finance and the Victoria EPA. There is a clear focus on community-wide impact and potential benefit to the community among all regulatory bodies and the oversight agencies, even where impacts on business may originally be the trigger for a RIS to be undertaken.

However, in relation to cost benefit analysis and monetisation, as mentioned earlier, the practice is often criticised. While Australia, according to one respondent, has 'led the world' in general equilibrium modelling and modelling of direct and indirect effects, it is still said by other respondents to be deficient in rigorous assessment of costs. Part of the reason may also be that at both national and state level, there is a willingness on the part of gatekeepers to accept qualitative assessment where quantification has not proved possible or may not be appropriate. Apart from considerations of lack of expertise within the civil service, or the weakness/lack of availability of hard data, there is an important additional cultural factor – perhaps not unrelated to the emphasis on community impact – that qualitative analysis is acceptable in its own right. There appears to be an ongoing debate in Australia on this topic.

Internal PC research documents have attempted to address the 'right' discount rate to apply for cost benefit analysis – which 'go to the frontier of welfare economics'. Social rates of time preference and the opportunity cost of capital are factored in. As in the UK and elsewhere, there is a tendency towards using lower discount rates, especially for example for climate change projects. Following the 2006 Banks Review (as the seminal report of the Taskforce on Reducing Regulatory Burdens on Business, 'Rethinking Regulation' is usually informally called), CBA modelling was strengthened.

Despite this, a senior OBPR official stated: 'We're flexible about quantification. Given problems with data collection, we're concerned that if we push too hard for quantification, we may well just get fudged numbers. But, even more importantly, we see quantification as one part of the broader analysis and we want the whole analysis to be adequate'.

In addition, OBPR noted the 'discrediting' of the Standard Cost Model tool at recent think-tanks and also considers multi-criteria analysis to be too subjective. The Business Cost calculator currently used in Australia is a modified SCM tool, which OBPR feels is the best model available to it given the dynamics of the Australian context.

At another level, Infrastructure Australia (responsible for oversight of significant infrastructure investments including public/private partnerships) has published detailed guidelines and coaching documents on how to conduct cost benefit analysis (see [www.infrastructureaustralia.gov.au](http://www.infrastructureaustralia.gov.au))

In another interesting turn, however, Standards Australia ([www.standards.org.au](http://www.standards.org.au)) has developed a net benefit tool. The OBPR considers that this is not quite right either, as it is too exclusively focused on qualitative analysis. However, Standards Australia itself deploys this tool regularly as it is ‘focused on outcomes and net benefits to the community, rather than on a narrow cost-based approach’, according to an official. Standards Australia says that, while its approach to net benefit does not include a detailed quantitative model, it contains performance-based criteria, which allows proposers flexibility in providing evidence using, for example, the Government’s Business Cost Calculator or other means, quantitative or qualitative.

The Australian approach to burden reduction also shows some subtle differences in thinking about evaluation. A senior Productivity Commission official said: ‘There is more emphasis here on qualitative analysis because we focus more on net benefit, rather than purely cost burdens. The economic framework in Australia is stronger and, perhaps as a consequence of this, we tend to look more at the public interest’. The PC’s own brief in undertaking reviews of regulation and regulatory burden is indeed to consider the broad public interest. Officials are also acutely aware that burdens on business ‘isn’t so much the accounting cost in pure dollar terms, but more the frequency of changes to regulations which can create opportunity costs for businesses by forcing them to change production processes or delay the introduction of a new product, for example’. According to the PC, the government is currently ‘giving good messages about better quality regulation, not simply deregulation’. Business compliance costs were thought to offer ‘far too narrow a focus.... however, cost benefit analysis can make you think a bit more about the merits of a given policy and the discipline involved forces you to justify a given policy option’.

In other criticisms of the operation of the new regime, the ACCC considers that there are some questions over how well the consumer benefit assessment is carried out. Some consumer protection regulators believe that the RIS process may often amount to box-ticking to achieved an outcome wanted anyway and that the process is insufficiently rigorous. A recent example cited was the passage of introduction of a national Unfair Contracts Law.

At the state level, Victoria offers some interesting contrasts as well as similar experience. The Better Regulation team, housed within the Department of Treasury & Finance suggested that ‘we’re still a long way from the point where we can say that thinking about regulatory options is second nature’. Officials there state that they regularly see proposals they consider deficient in analysis of regulatory options and that their job is to ‘sell the benefits of this approach and we often do this by saying ‘we’re only in the business of ensuring greater compliance by trying to reduce burdens’. In an important observation, a senior DTF official commented; ‘unless the arrangements are really institutionalised and become second nature for policy officials, it is very easy to unravel the “good” of Better Regulation processes’.

Victoria’s unique hybrid process of operating both RISs and Business Impact Assessments (BIAs) perhaps offers a broader focus than other jurisdictions, according to DTF officials who repeat the idea that, even if business impact acts as the trigger, social and environmental impacts are seriously considered. In addition, two further aspects are relevant. The first of these is the focus on the not-for-profit sector (itself the subject of a major review of burdens by the State Services Authority, see [www.ssa.vic.gov.au](http://www.ssa.vic.gov.au)) and also the Department of Premier and Cabinet’s 2008 Strengthening Communities initiative (see [www.dpc.vic.gov.au](http://www.dpc.vic.gov.au)). DTF officials observed that in the BIA structure, the quality of the underlying policy itself *can* be explored. Every policy official has to seek a whole-of-DTF view on the proposal while central agencies and other departments



also have the opportunity to comment, and, in the initial scoping out of the policy, when alternatives are being considered, there is opportunity to debate the merits of the policy itself. However, very importantly, it is considered a significant flaw that, unlike RISs, BIAs are not published. ‘BIAs suffer from that lack of rigour’,

A further interesting feature in Australia is that electoral manifestos are supposed to be subject to a RIS. Manifestos are treated as binding commitments. Notwithstanding the rhetoric and ambition, however, it is difficult to implement in practice and the OBPR has problems achieving this, given complexities of testing the numbers and assumptions used.

## 4.7 Dialogic Measures

The 2006 Banks Report of the Taskforce on Regulation was strongly critical of consultation practices. It noted that only 25% of regulatory agencies had consulted with the public when developing regulations. It called for a more systematic approach to consultation and made a number of recommendations for improving processes. All of these were accepted by the Australian Government and have since fed into the guidelines on best practice.

The Australian Government Handbook on Best Practice Regulation ([www.obpr.gov.au](http://www.obpr.gov.au)) notes that there are ‘strong synergies between regulatory impact analysis and consultation’. The Government has espoused whole-of-government consultation and urges that ‘meaningful consultation should start as early as possible in the policy development process...and continue through all stages of the regulatory cycle, including when important design features are being bedded down’. The guidelines note that industry associations may not represent all stakeholders in a particular sector and that large associations may not have a consistent view; therefore ‘consideration should be given to how best to engage individual stakeholders in the consultation process’.

Mention is also made of the need to manage expectations and to provide clarity about the scope for influence. For all regulatory proposals of major significance, a Green Paper outlining the policy options is required to be released for consultation and should contain most of the elements of a RIS. An issues paper or discussion paper may be an appropriate form of consultation for less significant proposals. In addition, the release of ‘exposure drafts’ which act to test the details of complex regulations prior to their finalisation with ‘relevant business interests’, is required for complex regulatory proposals. It is noted though, that, where an exposure draft is used, the primary decision (including RIS) will already have been made and the outcome may be that the RIS is amended on foot of consultation feedback on the exposure draft.

Consultation plans are a required element within the Annual Regulatory plans that all departments are required to publish. The Government urges creativity in approaches to consultation and the use of appropriate communications tools, other than merely newspaper advertisements and the seeking of written submissions.

The timeframes for consultation are not strictly mandated at Australian Government level; it being recommended that they should be ‘realistic’ (see OBPR, Best Practice Regulation Handbook). However, six weeks is recommended wherever the quantification of business compliance costs is required and 12 weeks for significant proposals. COAG recommends six weeks. VCEC notes that

although 28 days is the statutory minimum, Victoria government policy is that public consultation should run for 60 days wherever practicable.

Consultation is one of the criteria for adequacy considered by OBPR in its assessment of RISs and RISs have been rejected for insufficiently robust consultation. The RIS is required to contain a consultation statement that ‘demonstrated to the decision-maker that sound consultation practices were followed.

In an innovative move, at both Australian Government and COAG level, the use of a Business Consultation portal is mandated. The template for such a specific website was originally developed by the Department of Industry, Tourism and Resources. This mechanism is used to enable registration of stakeholders who are prepared to be consulted on particular regulations and to automatically notify stakeholders of any impending consultation processes relating to an area where they have previously registered interest. The Government of Victoria has also established its own Business Consultation Database (under the Department of Innovation, Industry and Regional Development). This is particularly aimed at small businesses and additionally allows businesses to note their preferred method of consultation, as well as their areas of interest.

One of the recommendations of the Banks Report had been the establishment of permanent stakeholder consultative forums. This particular recommendation has not (so far) been implemented at the level of the Australian Government. However, at the state level, Victoria has some experience of this. Worksafe, Consumer Affairs Victoria and the Building Commission all operate standing consultative committees, many of these (e.g. Worksafe’s) are of long standing.

OBPR is critical of policy officials’ apparent lack of proactivity in engagement with stakeholders early in the policy development phase (despite the clear guidance on this in the Australian Government Handbook). OBPR feels this is largely because of the relative newness of the regime and says ‘our role is culture change’; they see training of officials as a key part of the work ‘in order that they get the whole message and not just focus on the technicalities of how to prepare a RIS’. In this respect, OBPR’s current experience reflects that of the BR Unit within the Department of An Taoiseach in Ireland, another relative latecomer to implementation of Better Regulation practices. In a different perspective, officials with Victoria’s Department of Treasury & Finance suggested that policy officials are occasionally concerned about confidentiality (either in relation to specific issues such as in the competition arena or with regard to the Cabinet process generally). DTF points out that ‘a lot of initial work around new regulation happens out in the line departments and we don’t necessarily know about it early enough. Consultation doesn’t exactly happen *in camera*, but it might be invitation-only. Stakeholder management mightn’t always be well done and there isn’t a whole lot of shared learning going on’.

COAG’s consultation guidelines additionally state that policy agencies should review consultation processes and continue to examine ways of making them more effective and also state that Ministerial Councils should ‘provide feedback on how they have taken consultation responses into consideration’.

At state level, Worksafe in Victoria was mentioned by one respondent as having ‘phenomenal’ consultation processes. The recent (2007) revision of Occupational Health & Safety Regulations (which took two years to finalise) involved ‘senior VWA executives thrashing out every detail with stakeholders. They set up a rota of constant weekly consultative meetings. And moreover,

every single submission they received had a specific feedback' (see [www.workcover.vic.gov.au](http://www.workcover.vic.gov.au)). A further example cited related to the ACCC. When the Goods & Services Tax was introduced in 2000, ACCC introduced the voluntary Public Compliance Commitment under which CEOs of over 70 companies undertook not to pass on to the public more than the net tax effect.

VCEC states that over 50% of regulatory proposals for which a RIS was prepared between 2004 and 2006 were revised in light of public comments. It is noteworthy that no other jurisdiction in Australia (nor the Commonwealth) appears to evaluate the effectiveness of consultation undertaken in this way. VCEC also notes some inconsistencies in consultation requirements within Victoria. For example, other than the requirements of the Subordinate Legislation Act, there is no mandating of public consultation when regulation is implemented via primary legislation or other instruments such as Ministerial Orders or Codes of Practice. While there are several (VCEC identified 36) specific legislative instruments with consultation requirements ( see The Victorian Regulatory System, June 2008, page 8), there is little consistency as regards requirement for cost benefit analysis of different approaches nor for minimum consultation periods. (see VCEC website for comments in its latest Annual Reports). It is also noteworthy that the Scrutiny Committee of Parliament in Victoria has the power to invalidate regulations if adequate process (including vis-à-vis consultation) has not been followed (Subordinate Legislation Act 1994).

A few interesting points were raised by the Department of Treasury & Finance in Victoria in relation to consultative approaches and governance generally. Officials there say that there has been some limited backlash against apparently endless reviews by government. 'We got some criticism – people are saying when are you going to DO something and act?'. The language has changed to some degree– now the focus is more 'Listen, then Act' – there is a sense that people are saying 'we elected you to make decisions – get on with it'.

## 4.8 Oversight Measures

The development of the various gatekeeping roles (OBPR, the Better Regulation Office in NSW etc) has created a clear oversight on the impact analysis process. The limitations of gatekeeping are that – as long as a RIS meets the criteria of adequate analysis – no comment is offered on the appropriateness or otherwise of a particular measure. However, there is a clear focus on 'net benefit to the community' at the heart of both national and state-level approaches to regulatory impact assessment. The Better Regulation Unit in NSW asserts that this allows it some leeway in judging the merits of proposals, even though this is strictly speaking outside its remit. The OBPR sees its role as purely gatekeeping, but acknowledges that its home within the Department of Finance and Deregulation lends it authority and, further, that it works closely with the Policy Unit to the extent that the latter often does comment on the merits of policy proposals in tandem with OBPR's assessment of the adequacy of the related RIS.

A PC official pointed out that 'by the time OBPR gets to see a draft policy proposal, departments will already have consulted on it and it may be a done deal'. This official also identified a flaw in the Australian system relating to transparency. Whilst all RISs and OBPR's comments on them are supposed to be published, this is not actually happening in practice, yet. He also highlighted the key difference that COAG policy proposals have to consult on the RIS itself (i.e. publish a draft RIS), while this is not mirrored at Australian Government level, nor in most states. Where a Green

Paper is published, public consultation is mandatory. Yet Green Papers are not subject to OBPR assessment.

One official queried whether the OBPR had found the right balance yet between saying ‘that’s a really good RIS, but a dumb policy’. In fairness, however, this latter judgement is not within the OBPR’s remit. The criticism, even if valid, simply reflects the reality for Better Regulation gatekeepers in each of the three jurisdictions we have studied.

Australia’s Productivity Commission at national level and to an extent also, VCEC in Victoria, represent a **unique** additional function beyond the narrow gatekeeper role. There is no equivalent organisation in either the UK or Ireland. The Productivity Commission is the Australian Government’s independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. It is obliged under its statutory guidelines to take a ‘community-wide perspective’; it reports formally through the Treasurer to the Australian Parliament and operates under the powers and protection of its own legislation with formal independence at arm’s length from all other government agencies. The Commission is required to benchmark and review regulation and to provide the Government with policy options representing alternative means of addressing issues. (see Productivity Commission foundation documents at [www.pc.gov.au](http://www.pc.gov.au))

Both the PC and VCEC (also an independent agency, but with less formal independence than the PC) are charged with undertaking major regulatory reviews (often involving full public enquiries and always involving extensive stakeholder engagement) of specific sectors and regimes. Whilst such formal enquiries can only be held at the request of government, the PC in particular also undertakes its own extensive independent research. These two organisations have been at the vanguard of driving regulatory reforms and new thinking at the national and state levels, respectively. PC reports apparently carry a great deal of weight at Commonwealth level and their recommendations appear to be usually accepted by the Australian Government. In addition, the PC these days is also conducting enquiries which can have significant implications for governments at the State level, for example on issues such as water, energy, gambling, waste management policy and heritage. Much of this work is now coming to the PC from COAG and this therefore means that the PC is increasingly acting as a research-based advisor nationally to heads of all governments.

A further key point is that the PC ‘makes everything public at every stage and invites comment at every stage’. This practice is not fully mirrored in the normal process of government proposals as reviewed by the OBPR.

A key feature of Australian regulatory practice is the concept of review. To a greater extent than either the UK or Ireland, the principle of ex-post review is built into the core precepts of best practice regulation. All regulations at the Australia Government level have a 10 year sunset clause built in (NSW mandates 5 years). An important Commonwealth safeguard is that, where the Prime Minister exercises his prerogative (Prime Minister’s Exemption) to implement a regulatory measure without a RIS (or chooses to override an OBPR finding of inadequacy in a RIS), there is a mandatory three or four year review of the measure so decided. Such exercise of Prime Ministerial prerogative appears to be rare and has been usually deployed recently in security-related matters only. A recent example, however, was the decision by the Commonwealth Government to introduce a carbon emissions trading regime, rather than a carbon tax (see

[www.climatechange.gov.au](http://www.climatechange.gov.au) for the July 2008 Green Paper and White Paper of December 2008 and other consultation documents on this subject). A similar Premier's exemption, with similar review built in, exists also in Victoria. Also in Victoria, a senior official with the Department of Treasury & Finance summed up the state situation as follows: 'There is a strong flavour of review in our processes, particularly the Budget. We are very much down the outcomes path. We're working things currently so that we can get better at tracking whether a particular decision led to particular outcomes. This is seen as a priority'.

More generally, the concept of review seems to be culturally embedded in Australia. There is a strong tradition of parliamentary enquiries that are not under the direct control of government; of multi-party committees which draw evidence from a wide range of sources (even individuals have the right to be heard at such committees) and of Royal Commissions which 'can get to the bottom of entrenched policies and positions'. In addition the unique roles of the PC and VCEC were repeatedly referred to in interviews as providing an inbuilt, independent and highly-regarded review and evaluation role – particularly given their independence, quality of research and open, innovative approaches to consultation (bearing in mind, however, that both organisations can only initiate an enquiry on a reference from Ministers; however the PC in particular conducts and published own-initiated sectoral research too).

**An example of evaluation:** compulsory wearing of lifejackets in small recreational vessels. New marine safety regulations introduced in 2005 required all occupants of small boats to wear lifejackets. Before implementing the regulations, Marine Safety Victoria commissioned Monash University to evaluate their outcomes. Key findings included significant compliance, reduction in fatalities and (as predicted in the RIS), a fall in the price of lifejackets. Marine Safety Victoria considered that a key success factor was that planning for the evaluation before the regulations were introduced allowed for the collection of the necessary baseline data from the outset to measure the effects of the change and also informed the related communications strategy. ([www.marinesafety.vic.gov.au](http://www.marinesafety.vic.gov.au))

### **CASE STUDY: Victoria Competition & Efficiency Commission (VCEC)**

According to VCEC, its enquiry process 'is entirely consistent with reflexivity'. The Victorian Government refers regulatory issues where it believes there may be scope for improvement. To date, VCEC has looked at the food sector, building and most recently environmental regulation (all available at [www.vcec.vic.gov.au](http://www.vcec.vic.gov.au)) The reason for a government referral is that 'things aren't working as well as they might and there is enthusiasm for involving those affected to get them to input into how to improve things'.

VCEC, like the Productivity Commission, is an 'independent and analytical sieve' that provides a very public, transparent and non-political opportunity for different perspectives on potential improvements to be given. All submissions are published on VCEC's website. VCEC applies an economic filter to its reviews and is rigorous about both the collection and analysis of evidence. Initial recommendations are then published in draft form, inviting further public comment on VCEC's analysis of their views. In this way, 'government avoids becoming committed to any particular position until it can see how all arguments have been worked through'. The final VCEC report, when produced, is confidential to government, but it is published within six months of the government's subsequent response.



Specifically in relation to consultation mechanisms, VCE says that when it ‘gets wind of an enquiry coming our way,’ the first step is a stakeholder mapping exercise. Over and above advertisement for submissions, it is proactive about trying to engage with potentially interested parties. An Issues Paper is then released, generally with open-ended questions, designed to elicit views. This approach mirrors that of the Productivity Commission, operating at the Commonwealth level. After publication of the Issues Paper but before any public meetings are held, VCEC organises a number of individual meetings. It was noted by an interviewee that, given that consumer groups are often less resourced to engage, VCEC will actively approach them to raise awareness of the issue at stake and seek submissions. In the ongoing current review of environmental regulations, there have already been 60 such meetings.

Most interestingly, the Order that established VCEC in 2004<sup>25</sup> specifically instructs it to take a ‘community-wide remit’. While the business perspective is important, ‘it’s just one aspect’, in the words of one official. Although VCEC is involved in the Victorian Government’s drive to reduce red tape (and set reductions for burdens on business) as it assesses adequacy of Standard Cost Model analysis, officials also point out that, ‘in looking at environmental regulations as we are currently doing, for instance, we have to look at reducing burdens on business, but without compromising outcomes’.

VCEC’s other hat is, of course, its better regulation/RIS gatekeeper role. In that context, it says that the test for triggering a RIS in Victoria is whether there is an appreciable burden (social *or* economic) on one sector *of the public or community* (see Subordinate Legislation Act 1994 (Vic), section 7, and also Victorian Guide to Regulation, s 4.3). It tends to take a broad perspective and embraces the degree of flexibility built into the system. It also notes, however, that the responsible Minister has the final call on whether a burden is ‘appreciable or not’ and therefore as to whether a RIS is actually required. VCEC believes that a good analytical process can help minimise the risk that government gets locked into options which subsequent analysis and consultation might indicate do not maximise net benefits. It may also be, as in other jurisdictions, that good process at the preliminary stages limits the scope for Ministerial solo runs. In relation to the Business Impact Assessment (BIA) for primary legislation, VCEC says that burdens on business trigger the BIA, but, once triggered, a community-wide perspective has to be taken. With respect to the performance of individual government departments and agencies, their record is ‘variable in terms of quality’. VCEC reviews about 30 RISs per annum. The recent updating of the guide to regulation (two years ago) places a stronger focus on identifying the problem and examining the available options ‘with a forensic analytical lens’ – the latter acknowledged by VCEC to be ‘easy to write in a guidebook but hard to deliver in practice’. Victoria does not require publication of a draft RIS so there is no formal requirement for public consultation prior to the release of a RIS. Some departments and agencies undertake limited, if any, public consultation prior to a RIS being released, while others are fairly proactive about pre-meetings, targeted engagement of stakeholders and, in some cases, the release of discussion papers which drives forward the analysis of options. VCEC actively encourages early consultation and mapping of stakeholders, ‘we require them to be specific in the RIS about who was consulted and what were their views – we push them to be specific and we promote transparency’, but performance across departments varies. The adequacy of the RIS is assessed by VCEC to certify that it is fit for public consultation. ‘You have to quantify what you can reasonably be expected to quantify, including quantification of benefits. Otherwise, we’ll accept a multi-criteria analysis. The analysis should be proportionate to the

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<sup>25</sup> State Owned Enterprises (State body – Victoria Competition and Efficiency Commission) Order 2004

expected impact'. The nature of formal public consultation undertaken after the RIS is publicly released varies 'across a wide spectrum from one ad in a paper to active forums, briefings and meetings'. Departments are required to respond to all stakeholders with a comment/response on their submission. Finally, decisions following a RIS are subject to review by the Scrutiny of Acts and Regulations Committee of Parliament.

According to respondents, VCEC 'pushes quantification quite hard'. Its annual report reports specifically on RISs in the context of addressing quantification of costs and benefits. Whilst VCEC acknowledges that there can be problems collecting data, 'if you engage stakeholders early enough, it is possible to get the data'. VCEC also pushes hard for ex-post evaluation and it is for this reason that it has adopted the (unique in Australia) system of performance monitoring of regulators. Although the system is based on self-reporting of client satisfaction surveys and the data is not always validated by VCEC, 'the publicity works!'

VCEC officials cited a number of examples of exemplary regulatory practice in Victoria that might demonstrate reflexivity. Among these was the case of radiation safety licensing by the Department of Human Services (see [www.dhs.vic.gov.au](http://www.dhs.vic.gov.au) for documents). Previously, all X-ray machine operators were regulated under an apparatus licence. During a review process, the RIS consultation took on board comments and the regulatory regime moved to a management-based licence. However, dentists were still obliged to undertake frequent testing. Then, following further consultation, this burden was greatly reduced as it was agreed that the risk to the public was minimal and that dental establishments did not need to be subject to the same onerous requirements as other operators of X-ray equipment. VCEC also cited the EPA's proactive approaches to working with stakeholders to resolve problems (see below for fuller discussion of the EPA). In contrast, the year-long process involved in redoing Health & Safety Regulations (see [www.workcover.vic.gov.au](http://www.workcover.vic.gov.au)) was cited. This was a tripartite process involving Worksafe, employers and unions. Aspects of the public consultation led by Worksafe constituted more a form of competitive bargaining, as each side saw the negotiations as a zero-sum gain. That said, some reflexivity might be identified in other aspects that sought to ensure preferred regulatory solutions were readily implementable in workplaces.

In a further example of Australian innovation in regulatory reform, the Business Council of Australia (BCA, an organisation comprising the chief executives of 100 of Australia's leading corporations) monitors government performance and reports regularly on progress. It produces an Annual Performance Scorecard of Regulatory Reform ([www.bca.org.au](http://www.bca.org.au)) that compares states' and Commonwealth performance on regulatory reform generally and on reduction of red tape. The BCA ranks performance against criteria of good regulatory practice (including adequate consultation, use of cost benefit analysis and consideration of alternative options), transparency, accountability and review/evaluation. This Scorecard seems to receive a lot of attention at official level and, anecdotally, the BCA itself appears to be well-respected for favouring an agenda of better quality regulation (and perhaps, not being seen only as a lobby for less is more).

#### **4.9 Information/Communication Measures**

A significant criticism raised in interviews related to the issue of transparency. Currently, there is no requirement at Commonwealth level to consult on a RIS itself as it is being prepared by policy officials. Consultation is carried out instead on a Green Paper or on an issues or discussion paper –

released pre-RIS (and subsequently on an exposure draft, if it is required). But the RIS itself is not a consultation document. This is considered by the Productivity Commission in particular to be a major flaw. It also differs from the COAG practice, which both produces and requires consultation on a draft RIS and also demands publication of comments and the effect of such comments on changes to the policy proposal. The recommendation at Australian Government level that Green Papers be produced for significant regulatory proposals includes a reflection of the COAG approach to early publication and consultation, but the practice of producing Green Papers by government departments is far from becoming routine as of now. Interestingly, the ACCC (the competition regulator) also advocates consultation on draft RISs.

Additionally, there is no requirement to publish the RIS at the same time as a final decision is taken; instead the guidelines recommend publication as soon as practicable afterwards. In practice, as noted earlier, this has led to RISs being published six months or a year after decisions are made. As noted by one official interviewed, ‘all RISs and the OBPR’s comments on them are supposed to go onto a website but this hasn’t happened in practice yet’.

At the state level, as already mentioned earlier, a criticism in Victoria is the lack of mandatory publication of BIAs.

#### **4.10 Competition Measures**

Much of the current focus of regulatory reform seeks to measure the impact of regulation on competition and the burdens it may impose. As a result, harmonisation issues are near the top of the National Reform Agenda. Businesses that trade across jurisdictional boundaries have complained that regulatory discrepancies (or duplication/overlap of requirements) create the greatest burden for them. The principle of mutual recognition has delivered some relief in this context, although there is a fear that harmonisation and reducing regulatory burdens, while often complementary are not the same thing and occasionally can lead to lowest common denominator or even unintended outcomes (an interstate operator might well benefit from harmonisation being prepared to pay a higher cost for a national licence as compared with the administrative burden of managing eight different licences whilst a one-state operator might face an increase in cost burden being forced to pay extra for the national licence, especially if his business is mainly located in a low-burden state to begin with), or alternatively, diminish the benefits of regulatory competition between states.

#### **4.11 Reflexive Governance and Innovative/Effective Regulation**

Australia has generally been long considered a leader in the promotion of alternatives to traditional command-and-control methods of regulation, including models of self- or co-regulation. Standards Australia is among the frontrunners in advocating such approaches. Examples abound. One, the Australian Government has a strong view of what it wants to achieve in respect of energy efficiency, but has decided to achieve this via a Standards route, rather than direct regulation (see [www.energyefficient.com.au](http://www.energyefficient.com.au) and also [www.energyrating.gov.au](http://www.energyrating.gov.au)). According to Standards Australia, government should be clearly committed to taking the least interventionist route possible to deliver on an objective, in line with risk-based regulatory philosophy. ‘Quasi and co-regulation is the norm here’, according to an official in NSW, while Standard Australia also believes that quasi and co-regulation should be more acceptable in all states and at the national

level. Standards Australia acknowledged, however, that co-regulation is more likely to happen in technical spheres such as recently agreed national wiring standards ([www.wiringrulesstandards.org.au](http://www.wiringrulesstandards.org.au)) and especially the building standards arena, where The Australian Building Codes Board represents a joint initiative at all levels of government to create a national approach to building codes and standards (see [www.australia.gov.au](http://www.australia.gov.au)). The standards approach has also been adopted to a limited extent for the very recent carbon emissions trading scheme, where international standards have been adopted even though a tradeable legal right is established (see [www.climatechange.gov.au](http://www.climatechange.gov.au)).

Standards have been promoted as a possible solution to the perennial problem of harmonisation of regulatory rules across states. Occupational health and safety regulation and the registration of business names were cited by Standards Australia as two major irritants for businesses that deal cross-border, which can be more easily and efficiently addressed via a nationally applicable standards route complementing harmonisation legislation.

The Australian Competition and Consumer Commission (ACCC) is a regulator which has also actively pursued alternative models of regulation, as is the NSW Legal Services Commissioner.

### **Changing Hearts and Minds with a Variety of Regulatory Options: Examples from the ACCC (all documents referred to in these examples are available on ACCC website – [www.accc.gov.au/publications](http://www.accc.gov.au/publications))**

#### **1. The Trade Practices Act 1974 and ACCC's approach to debt collection agencies.**

Under the Trade Practices Act, there is a provision to prevent traders from harassing consumers who owe them. ACCC officials, in interview, recounted the following experience with a major representative organisation. Complaints from consumer organisations to the ACCC concerning the behaviour of debt collection agencies led to ACCC action in 1996. Bringing together the consumer organisations and the agencies, a set of guidelines was collaboratively produced. Behaviour subsequently improved. However, by 2007, the consumer organisations were again complaining about deteriorating practices. This time, the ACCC went public. It announced in the media that it would hold a roundtable forum to seek industry's views and also held a phone-in day for individual consumers. The Debt Collection Industry Association were unhappy with the publicity and, while it attended the forum, there was little constructive engagement. The ACCC then met the association and took a listening approach. The attitude was to get beyond the them-and-us mode and try to encourage trust. Once this occurred, the association acknowledged that problems existed but highlighted two key issues for them – one, the difficulty of high turnover of staff in call centres in the larger organisations and lack of education/awareness in smaller ones. Once these issues were on the table, the Association began to talk about working with the ACCC to shape an approach that would address these issues and also improve behaviour.

#### **2. Casual mall leasing**

This case related to the temporary permissions given by shopping centre landlords to casual traders (e.g. Christmas tree sellers). Retail tenants complained of unfair competition (temporary traders selling Christmas cards right outside a permanent newsagents's premises). Although retail tenancy is usually a State, rather than a Commonwealth issue, the ACCC is responsible for Commonwealth competition, fair trading and consumer protection laws, which can transcend borders. In this instance it had to balance its own remit as the competition regulator with that other responsibility.

South Australia was the first state to try to deal with the problem. It developed a Mandatory Code of Conduct aimed at landlords. The Shopping Centres Council (representing landlords) put considerable energies into telling all the other states that, although SA's Code was good at addressing the issues, it was unnecessary for it to have mandatory status and the other states should not follow suit. The Council undertook to abide by any Code introduced elsewhere on voluntary basis. The other states listened, changed their minds (as many had indeed been committed to following SA's example) and introduced voluntary codes. This avoided further proliferation of 'black letter regulation'. (Victoria, however, did add a rider that, if the voluntary Code did not work satisfactorily, it reserved the right to resort to a mandatory approach).

#### **Working Together Builds Trust and Yields Results: The Horticulture Code 2007**

Growers, particularly those located long distances from their ultimate markets, expressed concerns that they were not getting a fair price for their produce. And, further, they were experiencing returns of produce in poor shape (unsaleable), whose costs of destruction the growers had to bear, and yet they had sent out the produce in perfect condition. They feared that wholesalers were ripping them off. The ACCC response was to encourage the wholesalers to deal with the growers and develop commitment to a voluntary Code. The government facilitated this process by creating a framework and funding for a dispute resolution function. The Code, however, was not very successful and growers remained unhappy. Calling the wholesalers back in, the government made clear that it took the matter seriously and would resort to a mandatory option. Still, there was little progress and evidence of polarised positions. A mandatory Code was brought in. Following an ACCC review of the Code's operation and recommendations on changes, the department of Agriculture once more brought all the stakeholders together and set up a Code Committee of stakeholders under the auspices of the department to work together on improving the Code. The operation of this Committee has generated increased trust and much of the polarised debate has evaporated. The ACCC notes, however, that there are a couple of stakeholder industry associations who do not participate in the Code Committee and their attitudes remain much more entrenched.

#### **When Self-Regulation works better? The Real Estate Institute of Australia.**

ACCC had issued guidance on misdescription of properties for sale (there had been evidence of photoshopping of house pictures to airbrush out electricity pylons and the like). The National Guidance developed on this was overshadowed by ACCC's interpretation of the Trade Practices Act; real estate agents were at risk of legal action against them if they breached the guidance. Then, other problems emerged with evidence of dummy bidding at auctions to inflate prices for properties. The ACCC released a very critical media release on this which galvanised the Institute into action. The ACCC was nervous about meeting and working with agents whom it might ultimately need to prosecute so the Real Estate Institute took the lead and decided to develop a new Guidance Note. Following a number of difficult meetings (in this case it was the government side – the ACCC – which did not want to budge on its position on interpretation of the Trade Practices Act 1974 and threat of court action), good faith eventually was established and the new Guidance Note produced. Institute members appeared more committed to abiding by its precepts. And behaviour has indeed improved since. The ACCC believes that better compliance has been achieved because of industry's ownership of the solution – whereas previously the earlier Guidance had been seen as 'the Regulator's view'.

#### **Using Monitoring and Publicity to Achieve Results: Motor Vehicles Regulation.**



The ACCC concluded that a number of car dealers were not complying with regulations of their industry. Guidance notes were issued but these received what the ACCC describes as a ‘limp’ response. It then conducted formal research to measure the conduct and concluded that there was only 55% compliance with the rules. It published this research and threatened court action. Industry responded, engaged with the ACCC, reviewed the Guidance Note and identified the top ten problems and undertook to deal with members. Subsequent re-measurement by the ACCC revealed 88% compliance with the regulations.

We found instances of reflexivity in our research in Australia, but these have tended more to arise in Productivity Commission or VCEC reviews and enquiries as well as in the habitual practices of organisations such as the Environmental Protection Agency in Victoria and Standards Australia. All of these organisations have adopted innovative consultation practices and also appear to give real consideration to regulatory alternatives, routinely involving business as well as other stakeholders in developing solutions to problems. The system of Better Regulation as it exists in Australia, especially at the Commonwealth level, seems to have some of the same features found elsewhere which can militate against reflexivity – lack of consultation on RIS documents, consultation happening before a RIS is prepared which means it can be difficult to trace changes or learning that occurred in the policy development phase, the emphasis on a narrow gate-keeping role for the OBPR and the consequent distancing from those charged with the management and promotion of best practice regulation from the actual process of policy development and stakeholder engagement.

However, the existence and operation of the PC and VCEC may actually give Australia an edge in terms of best practice stakeholder engagement. The strong focus on, and apparent political commitment to, review and evaluation of regulation as an essential element of best practice has given these organisations significant influence and their reports are authoritative and usually accepted by government at the Commonwealth and Victorian levels, respectively. In addition, both (but above all the PC) are noted for their inclusive and innovative approaches to consultation and commitment to transparency. As one commentator noted, ‘the PC’s approach is the Rolls Royce of public engagement’.

The PC routinely releases Issues Papers and consults extensively on drafts of its research. It holds roadshows, key stakeholder conferences and public meetings and its processes are highly transparent. VCEC (see Case Study) mirrors many of the approaches of the PC but its remit is limited to one state – Victoria – whilst that of the immensely influential PC is nationwide.

In NSW, the Legal Services Commissioner takes the view that regulation is about ‘behaviour, or changing behaviour; it shouldn’t be about technical specifics’. He considers that (central) government ‘only knows how to do top-down regulation, which has limited utility’. The independent regulatory agencies tend not to prescribe the model they want regulated parties to follow; they tend to recognise organisational culture to a greater extent and are more flexible. He believed that independent agencies are better at facilitating collaborative problem-solving. Citing the remit of his own office, he said: ‘we’ve stopped being a complaints handling office (and enforcer of discipline) and focused more on changing the culture of the organisation(s) against whom complaints were being made’.

A strong advocate of co-regulation, the NSW Legal Services Commissioner argues that while self-regulation doesn’t always work, ‘if you withdraw the capacity for self-regulation, the shutters

come down and you revert to a very adversarial relationship between the regulator and regulated party. The optimal solution is to keep the best of self-regulation and ensure you have an adequate external check or monitoring system -essentially a big stick’.

The Environmental Protection Agency in Victoria has a strong reputation for innovation in its approaches to problem-solving and stakeholder engagement. It has been pointed out that the environmental area often yields evidence of reflexivity, perhaps because of the absence of a long history of either rulemaking or entrenched interests. It is interesting to note similarities in some of the approaches detailed below with approaches adopted also by Ireland’s EPA.

The EPA focuses on procedure-oriented processes, aimed at achieving overall objectives and utilises participatory procedures to do this. It seeks mechanisms to encourage deliberation and sharing of information between the parties it regulates, affected communities and itself. The EPA uses trials and pilots to test different options for solutions (an approach strongly advocated by the Productivity Commission as good regulatory practice but not widely deployed). It has also set up a number of Advisory Panels and committees, including a Carbon Innovators’ Network.

The EPA sees its role as to ‘reinvent relationships’ and it ‘tries to take a traditional regulatory tool and get bigger outcomes’ (see 2 below for an example of innovative expansion of pollution licensing).

The EPA has commented that ‘sometimes we’re trapped by the economic analysis demands of the RIS process. It’s good to have the rigour, but you need to get the balance right, if you’re outcome-focused and trying to use creative means to get there’

The EPA cites one of its earliest successes in relation to chemical production at Altona in the 1980s. There was a large concentration of chemical production at this Melbourne beachside resort. The various companies’ environmental performance was ‘terrible’ and there was mutual dislike between the residents and the producers. In one of the early examples of working together, the EPA brought both sides together and ‘although there was blood on the walls in the early days, these days we bring international visitors like the OECD to Altona to show what has been achieved’.<sup>26</sup>

## **Reflexive Regulation in Practice: (examples 1-5 below are all EPA of Victoria)**

### **1. Environmental Improvement Plans.**

(EIPs) have been cited elsewhere (by academic commentator Neil Gunningham, for example) as an instance of reflexivity. In EIPs, residents of a community, local companies and the EPA jointly develop an EIP, which set out concerns and priorities on both sides. An EIP is a public commitment by a company to enhance its environmental performance. This new type of policy instrument represents quite a significant departure from conventional command-and-control regulation. First, it emphasises a systematic approach to pollution prevention by influencing management practices and ‘making industry think’. Second, it involves the local communities in the priority-setting and planning, thus involving stakeholders actually in the process. Professor Gunningham cites studies that suggest EIPs have been successful in pooling knowledge and ideas

<sup>26</sup> There is a detailed history of the Altona/EPA story contained in a paper written by the EPA’s Toni Meek in 2005 on Environmental Improvement Plans. [www.latrobe.edu.au](http://www.latrobe.edu.au)

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in a way that produces innovative ideas and provides a framework for companies to think through solutions to environmental problems in more strategic ways. EIPs are regularly called up by the EPA in renewing pollution licences. Should a breach occur, the line officer in the offending company has to come to a public meeting in the community to explain. Some 50 or 60 such arrangements now exist across Victoria and are regarded by the EPA as ‘close to the best thing we’ve ever done’. (For a detailed analysis of EIPs, see also the EPA’s Toni Meek’s 2005 paper at [www.latrobe.edu.au](http://www.latrobe.edu.au))

## **2. Corporate Licensing.**

Every EPA in the world apparently does single-site pollution licensing. Changes to the relevant legislation contained in the Environment Protection (Amendment) Act 2006 allowed the Victoria EPA to amalgamate licences. Goulburn Valley Water Authority was the first recipient. It previously had 26 separate licences for different treatment plants with 224 pages of conditions. Now, it has a single licence running to just three pages – thus managing to reduce a significant burden on the company. The new licence is outcome-based, not focused on the specifics of implementation. In developing the licence, the EPA brought a senior Du Pont executive to visit the Water Authority and facilitated a three-hour workshop for senior executives. The EPA styles itself as ‘not a prescriptive regulator, but a listening organisation. According to it, the brainstorming at that workshop has led to working now on a continual basis with the Water Authority to conduct lifecycle analysis of their business, ‘trying to help them add to their profit line and improve how they do their business in a way that achieves our objectives too’. The EPA and the Water Authority are jointly funding work with the Authority’s major customers to help them reduce their own water usage – even though the EPA’s only official remit is to licence the water treatment plant, it is engaging with the ultimate users as part of the overall environment improvement effort. ‘Instead of telling the Authority to spend A\$10 million, upgrading their water treatment plant, why not spend some money upstream at the users’ own plants to clean production processes – which will cost less anyway?’

## **3. Sustainability Covenants.**

These relate to companies beyond the EPA’s regulatory remit. They are voluntary agreements. The EPA tries to influence companies and groups to state some sustainability goals and how they will deliver them. Some manufacturing companies, and a superannuation fund are among those who have signed up to this innovative new initiative. The work is done publicly and the organisations commit to delivery. If they fail to meet commitments, the EPA will refuse to renew the agreement. This is a good example of the EPA trying to raise good environmental practice and awareness beyond its own role as regulator.

## **4. Prescribed Industrial Waste Regulations.**

In February 2009, the EPA released new draft Regulations updating the Environment Protection (Prescribed Waste) Regulations 1998. In this case, the EPA is ‘consciously trying to focus on front-end consultation’. Rather than simply presenting an issues paper and consulting on it, the EPA ran a number of workshops with stakeholders ‘even before we put pen to paper’. Given the focus of the revision of the Regulations was to reduce burdens (in line with Victorian Government’s targets), ‘we are happy to let business come up with the optimal implementation mechanisms and not constrain them too much. We are focused on getting the outcome, on realising the environmental objective’.

### **5. Environment Resource Efficiency Plans (EREPs).**

These were introduced in the Environment Protection (Amendment) Act 2006. The issue was to identify the top 200 users of energy and water in the state with the aim of getting them to reduce their consumption. Again, this takes the EPA outside its traditional licence base and into areas such as hotels, shopping centres etc. The system devised has been to require action by the users, where they can achieve savings within a three-year payback period. If the payback period is longer, action is not required. While this is a more prescriptive tool than sustainability covenants, it still involves the EPA 'using our regulator's hat in a different way' and focusing on the business benefits of improved environmental performance for a wider variety of enterprises. Teams from the EPA are actively working with organisations to identify where the savings to them might be generated.

### **6. Australian Government's Department of Climate Change – setting up an external auditing system for carbon pollution reduction schemes.**

The Department produced a discussion paper (see consultation documents on [www.climatechange.gov.au](http://www.climatechange.gov.au)) concerning who (which experts) should constitute such a system. Given that there are established auditors in the financial, environmental and engineering arenas, it generated lively debate and much dissension. 'Everyone wanted a different auditor', according to a Department official interviewed. So the Department set up facilitated workshops which mixed individual companies and all the relevant professionals. This process led to a change of minds and the eventual acceptance of a mix of professions and expertise in the auditing panel. Is this an optimal outcome that will deliver the greatest benefit, or is it in fact a lowest common denominator outcome, representing compromise where all interests are satisfied without any real shifting in fundamental positions? Presumably, only time will tell, when the auditors' combined work is delivered.

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[www.dcsf.gsi.gov.uk](http://www.dcsf.gsi.gov.uk)  
[www.homeoffice.gov.uk](http://www.homeoffice.gov.uk)  
[www.environ.ie](http://www.environ.ie)  
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[www.vic.gov.au](http://www.vic.gov.au)  
[www.pc.gov.au](http://www.pc.gov.au)  
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[www.entemp.ie](http://www.entemp.ie)  
[www.justice.ie](http://www.justice.ie)  
[www.betterregulation.ie](http://www.betterregulation.ie)  
[www.ofcom.org.uk](http://www.ofcom.org.uk)  
[www.ofwat.gov.uk](http://www.ofwat.gov.uk)  
[www.dh.gov.uk](http://www.dh.gov.uk)  
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# APPENDICES

## Appendix I

Core Dimension	Revision	Example	Process	Actors Involved	Comments
Primary and Secondary Legislation	Private and Self-Regulatory Rules – “quasi-legislation”	Australia	Independent Agency (former Office of Regulatory Review); Mandatory consultation, publication of green papers, exposure drafts and regulatory plans	Small Business Deregulation Task Force (1997)(business people and professional advisers) Government, interdepartmental committee on quasi-legislation (1998) Business	Engaged consultation appears to have resulted in redefinition (or expansion) of the problem
Rules	Implementation	UK Enforcement Concordat (1998)	Broadbased engagement	Government Department, Local Government Association, Business and Consumer Groups	Superseded by legislative ‘compliance code’ (following Hampton Review (2004))
Regulation of Business	Regulation of Government	UK Public Sector Team	Central government initiative; consultation with academics	Better Regulation Unit Better Regulation Task Force (Business Representatives)	Idea appears to have come from academic study – example of ideas rather than interests shaping agenda
Government Job	Engagement of Key Stakeholders	UK Ireland Consultation Processes	Consultation Guidelines (Ireland, 2005)		Consultation guidelines drawn to reflect, at best, externalist view of reflexive governance
Cost- Benefit Analysis as Main Instrument	Drawing in Alternative regulatory methods	UK <i>Alternatives to State Regulation</i> (2000) and <i>Less is More</i> (2005) Ireland <i>Regulating Better</i> (2004)	Industry task force	Better Regulation Task Force	Little evidence of delivery on the commitment to alternatives to regulation in practice

**Table 1 Initiatives in Developing Better Regulation**

\* Reasonable \*\*Good \*\*\*Very good \*\*\*\*Excellent

Method	Method good for:					
	Providing Information	Seeking information	Representative views	Quantitative views	Qualitative views	Special interest views
Advisory Committees	***	****	***	*	****	*
Ballots / Referenda / Deliberative Polling	**	**	***	****		*
Citizens' Juries	****	**	**	*	***	*
Citizens' Panels	***	***	****	***	***	*
Comment / Suggestion Schemes		**	*	*	**	*
Community Fora	**	**	***	*	***	
Customer Surveys	*	***	****	****	*	*
Customer User Panels	****	***	**	*	***	***
Face-to-face interviews	***	***	*	*	****	***
Focus Groups	***	***	**	*	***	***
Foresight / Market Observatory	***	****	**	**	****	*
Information Technology	***	**	*	**	*	*
Inquiry by Design	****	****	***	**	****	**
Mystery shopping		***	**	*	***	*
National Fora	**	****	***	**	****	**
Open Days / Road Shows/Exhibitions	****	*	*	*	*	*
Piloting proposals	**	***	***	*	***	*
Public Meetings	****	*	*	*	*	*
Written consultation	****	***	**	**	**	*

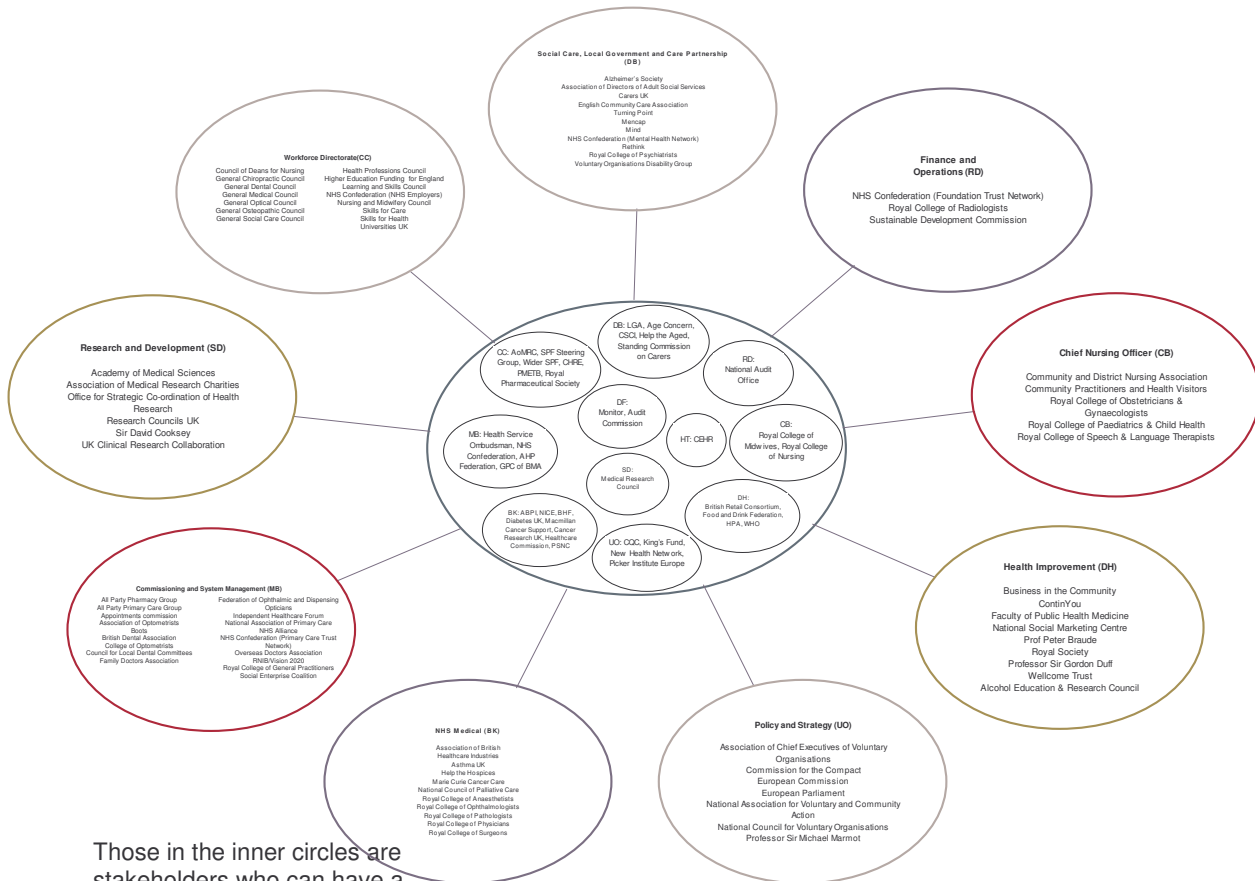
^ Adapted from the UK Cabinet Office publication, *How to consult your users*, 1998.

This chart is a “rule of thumb” guide only.

Table 2 *Comparative Chart of Consultation Methods* Source : (DEPARTMENT OF THE TAOISEACH nd)

# Appendix II

## DEPARTMENT OF HEALTH'S CORPORATE STAKEHOLDERS AND PARTNERS DRAFT v2.1 FOR DISCUSSION



Those in the inner circles are stakeholders who can have a substantial and significant impact upon the Department's delivery of one or more of its key objectives.

Those in the outer circles are stakeholders who can have a substantial and significant impact upon a Directorate's key objectives.