

## Written evidence submitted by Office of Rail and Road to the Railways Public Bill Committee (RB08)

1. ORR welcomes the opportunity to contribute to the Public Bill Committee's scrutiny of the Railways Bill. This submission provides a summary of how the Bill and the establishment of Great British Railways (GBR) is expected to affect the role of ORR.
2. The Bill will have a significant impact on ORR's responsibilities, leading to a change in our overall role. ORR will be undertaking a major transformation to fulfil its new role – including as an independent, expert advisor to the Secretary of State – and to integrate with the wider reform programme. This new role includes:
  - **A broader monitoring and reporting role covering all of GBR's activities** informed by guidance from the Secretary of State, alongside a licence enforcement role that includes long-term asset stewardship, GBR's role in the management and operation of industry retail systems, as well as requirements on passenger information, accessible travel, complaints, delay compensation and the Rail Ombudsman;
  - **A reduced enforcement role in other areas**, with a greater role for the Secretary of State in holding GBR to account;
  - **A similar role to today for ORR in a new funding process** with a wider scope centred on advising funders on GBR's integrated "track and train" business plan; and
  - **A reduced role for ORR in relation to access and use of the network**, with GBR making access decisions and setting access charges for use of the network, and ORR performing a new appeals role.
3. There are also areas where ORR functions will not be impacted by the Bill, including health and safety regulation, production of rail statistics, competition and consumer law enforcement, and our existing roles in relation to roads, non-GBR infrastructure managers and the Channel Tunnel. We will also continue to work closely with all operators, infrastructure managers and stakeholders who will not be part of GBR.
4. This submission summarises the effect of the Bill on ORR's role, structured in terms of:
  - (i) The Bill's impact on what ORR does and how it does it;
  - (ii) Monitoring and enforcement;
  - (iii) The new funding process: the Funding Period Review;
  - (iv) Access and use of the network; and

(v) Next steps.

**“ORR will play a central ongoing role in ensuring that the reformed rail system works effectively. It will act as a critical friend to both the Department for Transport and GBR – trusted to speak candidly, operate independently, and add value through expertise.”**

### **A Railway Fit for Britain’s Future: Government Response**

#### **The Bill’s impact on what ORR does and how it does it**

5. ORR has a range of statutory functions which set out what it is expected to do. It also has statutory duties which set out what it is expected to consider when carrying out its functions, including when making decisions. ORR’s website [provides an overview of its current roles](#), including its current statutory duties and functions.
6. As a result of the Bill, ORR will have new and reformed functions including monitoring GBR’s performance; enforcing GBR’s licence; advising funders as part of the new funding process and determining appeals of GBR decisions on capacity allocation, access and charging. ORR will no longer perform some of its existing roles, including in relation to track access, passenger information, accessible travel, complaints, delay compensation and sponsorship of the Rail Ombudsman. Further sections of this submission outline these changes in more detail.
7. Many of ORR’s functions are not directly affected by the Bill, including:
  - **Health and safety:** ORR will continue to regulate health and safety for the entire mainline rail network in Britain, as well as London Underground, light rail, trams and the heritage sector;
  - **Rail statistics:** ORR will remain the primary producer of Official Statistics for rail, with the majority of ORR statistics assessed and designated as National Statistics by the Office for Statistics Regulation;
  - **Competition law:** ORR will retain powers concurrent with the Competition and Markets Authority (CMA) to enforce competition law in the sector, and to conduct market studies where rail-related markets may not be functioning well (this is separate from ORR’s duty to promote competition, which is outlined below);
  - **Consumer law:** ORR will retain powers concurrent with the CMA to enforce consumer law in the sector;

- **Roads:** ORR will continue to monitor and enforce the performance and efficiency of National Highways, which manages the strategic road network in England;
- **Other infrastructure managers:** ORR will continue to regulate non-GBR rail networks under the existing framework, for example High Speed 1, the Core Valley Lines and the Crossrail Central Operating Section of the Elizabeth line;
- **Channel Tunnel:** ORR will retain functions relating to international train services including economic and safety regulation of the Channel Tunnel; and
- **Other roles:** ORR will continue to perform other roles including train driver licensing; interoperability authorisations; station, network and service closure ratifications and regulatory functions in respect of Northern Ireland.

### Statutory duties

8. The Bill provides ORR with reformed duties. These will replace ORR's existing duties under Section 4 of the Railways Act 1993 and will apply to all of our railway functions across GBR and non-GBR – except for ORR's health and safety, train driver licensing, competition and consumer law functions (where ORR will continue to enforce competition and consumer law concurrently with the Competition and Markets Authority).<sup>1</sup>
9. ORR's reformed duties are aligned with those of Ministers and GBR and have a strengthened focus on taking the public interest and public funding into account. These duties will define how ORR will carry out its functions. In summary, they are to:
  - Promote the present and future interests of passengers, including, in particular the needs of disabled passengers;
  - Promote the use of the railway for freight;
  - Promote high standards of performance;
  - Enable the industry to plan for the future with a reasonable level of assurance;
  - Act in the public interest;
  - Take the cost of public funding into account and the need to make efficient use of public funding;
  - Take safety into account in ORR's non-safety functions;<sup>2</sup>
  - Take any Secretary of State or Scottish Ministers' guidance into account;<sup>3</sup> and
  - Take Secretary of State, Scottish Ministers' and Welsh Ministers' strategies into account.<sup>4</sup>

10. These duties will set out what ORR must consider or aim to achieve when carrying out its roles. While some of ORR's duties in the Bill are the same as, or similar, to ORR's current duties, there are differences: for instance, ORR will no longer have specific duties relating to the environment or sustainable development, but will have a new duty to act in the manner best calculated to be in the public interest (which may include economic, social and environmental considerations).
11. Depending on the circumstances, the changes to ORR's duties could have a potential impact on ORR's policy approach in some areas or on individual decisions. As part of its transformation under rail reform, ORR will consider in detail the exact impact of its reformed duties on what it does and how it does it.
12. As today, ORR will also have a duty to promote competition – but this duty will not apply to some ORR roles including regarding appeals on access and use of GBR's network.<sup>5</sup> This means, for example, when deciding whether or not to uphold an appeal from an operator who wants access to GBR's network, ORR will not consider how best to promote competition in the provision of railway services for the benefit of users, as it does currently.

## **Monitoring and enforcement**

### **Monitoring GBR's statutory functions**

13. At present, ORR monitors whether Network Rail is complying with requirements set out in its [network](#) and [station](#) licences. In future, by contrast, ORR's monitoring of GBR will be primarily based on how GBR performs its statutory functions.<sup>6</sup> Under the Bill, GBR's statutory functions which ORR must monitor include, in summary:<sup>7</sup>
  - Managing, operating, maintaining, renewing and improving the network;
  - Operating most railway passenger services in England, as well as cross-border services in Scotland and Wales; and
  - Setting fares, selling tickets, and providing essential systems and services to facilitate the operation of railway passenger services.
14. This includes areas where ORR has not previously had a role, such as monitoring the performance of passenger services. In performing its monitoring role, ORR will be informed by guidance from the Secretary of State which will help to ensure that the monitoring is targeted, proportionate and outcomes focused.
15. When monitoring GBR under the provisions of the Bill, ORR will consider whether and how GBR is delivering the activities set out in its business plan. It will also consider the costs of carrying out those activities, the income GBR has received, and how this compares to the

estimates presented in the business plan. ORR will also consider how GBR is helping to further railway safety.

16. ORR will be able to investigate issues and raise them with GBR for attention. GBR is ultimately accountable to the Secretary of State, so when exercising the monitoring role, ORR will not have enforcement powers. ORR can instead raise issues with the Secretary of State, who can decide whether to take further action.<sup>8</sup> Scottish Ministers will also have powers to act where Scottish railway activities are concerned.<sup>9</sup>

#### **GBR licence**

17. As well as monitoring GBR's statutory functions, ORR will monitor and enforce GBR's licence. GBR's licence will be drafted, issued and where necessary amended by the Secretary of State.<sup>10</sup> Development of GBR's licence is currently underway, led by the Department for Transport (DfT), and will be subject to public consultation. It is expected to be focused on industry obligations and processes that GBR must fulfil or facilitate, and to include requirements relating to passengers (see "Passenger Watchdog" below). Once issued, ORR will also be able to modify GBR's licence with GBR's agreement.
18. In general terms, as is the case currently with Network Rail, if ORR suspects GBR may be in breach of any of its licence conditions, ORR will be able to identify and investigate issues, seek early resolution and take enforcement action if necessary. Unlike today, ORR will not be able to issue a financial penalty for a GBR licence breach.<sup>11</sup>
19. GBR's licence is expected to focus on a more targeted and specific range of activities than the current Network Rail licence. The targeted nature of GBR's licence means that ORR will no longer be able to take enforcement action in some areas where it has done previously, such as issuing enforcement orders in relation to train service performance. Instead, for matters outside the scope of GBR's licence, ORR would be able to investigate and raise concerns to the Secretary of State via the statutory monitoring role outlined above. It would then be for the Secretary of State to decide on any action.
20. Subject to consultation, the UK Government intends to include in GBR's licence a narrow, outcomes-focused requirement on long-term infrastructure asset stewardship. This will ensure that ORR can take enforcement action which is effective and proportionate to the long-term risk of asset deterioration. This is an important safeguard in how GBR looks after its infrastructure in an efficient, sustainable way, while ensuring a safe and well-performing railway.
21. In addition, GBR will be a retailer absorbing 14 current train operating companies' ticket retailing operations as well as owning and managing the central systems used by all retailers – including its direct competitors. For this reason, GBR's licence will also contain a new

requirement to ensure GBR supports an open and competitive ticket retail market and treats independent ticket-selling companies fairly.

22. GBR's licence will require it to comply with a code of practice setting clear requirements for how GBR will manage industry systems that facilitate the rail retail market, and how it must interact with the rest of the market.<sup>12</sup> The Secretary of State and ORR will jointly create the code with input from industry and ORR will manage and enforce compliance with the code via GBR's licence. Non-GBR retailers will be able to challenge GBR decisions or actions they consider to be non-compliant by raising them directly with ORR. ORR will be required to investigate and, if it considers that GBR has not complied, it will be able to demand corrective action by issuing binding orders on GBR.

#### **Non-GBR licences**

23. While GBR's licence will be issued by the Secretary of State, ORR will continue to issue and enforce railway licences for other operators and infrastructure managers across Great Britain to ensure they are 'fit and proper' to run a railway and promote effective and efficient working relationships across the sector. Non-GBR licence holders will include devolved, freight, charter and passenger open access train operators; light maintenance depot operators; some non-GBR infrastructure managers' networks such as the Core Valley Lines; and operators of over 800 stations that are expected to remain outside of GBR.

#### **A new Passenger Watchdog**

24. A new Passenger Watchdog will be established, grown out of Transport Focus. It is expected to take on functions currently carried out by ORR in relation to passenger information, accessible travel, complaints, delay compensation and sponsorship of the Rail Ombudsman. The Passenger Watchdog will set requirements on industry in these areas through guidance and codes of practice, subject to agreement by ORR and the Secretary of State.<sup>13</sup> These will be made binding on the industry via conditions in both GBR and non-GBR operators' licences. The Passenger Watchdog is expected to monitor and publicly report on industry performance against these standards, to seek improvements from industry, and may refer concerns to ORR.<sup>14</sup>
25. ORR will continue to be responsible for enforcing the licence conditions associated with these standards. This means it will be for ORR to decide whether to take enforcement action in response to a potential licence breach, including following a referral from the Passenger Watchdog. ORR will also retain its consumer law powers, which it has previously used in areas such as improving the [transparency of fees](#) charged during the ticket buying process. Key issues which matter to passengers, such as train service performance, will also be encompassed in ORR's wider roles monitoring GBR's performance and providing advice to funders on GBR's commitments in its integrated business plan.

## **Funding Period Review: the new funding process**

26. Across all of its activities GBR will be funded from a range of sources including government grants, income from fares, charges paid by non-GBR train operators for accessing GBR's network and property and commercial income. The Bill makes provision for a reformed five-yearly funding process for GBR, known as the Funding Period Review (FPR).<sup>15</sup> Unlike the current periodic review, ORR will no longer conduct a review of charges paid by train operators to access the network – as GBR will set charges under the new framework. ORR will no longer make a final determination at the end of the process: instead, ORR will provide advice to funders (Secretary of State and Scottish Ministers) throughout the process, and the funders will approve GBR's integrated business plan.
27. It is expected that the FPR will determine the funding for GBR's network operation, maintenance and renewals (OMR) activities – although the Bill allows for a wider range of GBR activities to be funded via the new process if Ministers wish. In practice, this means that although GBR's assumptions about future passenger services funding and revenue will be considered as part of GBR's five-yearly business planning, to start with GBR's passenger services funding will be determined through the UK Government's [Spending Reviews](#), separate from the new funding process.

## **How this will work**

28. To a timeline to be defined by ORR, the Secretary of State will publish a Statement of Objectives outlining the objectives for the railway (replacing today's High Level Output Specification, or HLOS), along with a Statement of Funds Available (SoFA) estimating the funding the UK Government can provide to fund GBR (in addition to income from other sources) in order to cover the expenditure required to deliver those objectives. The Secretary of State will be required to consult ORR when developing the SoFA and a range of parties – including devolved governments and authorities, ORR and the Passenger Watchdog – when developing the Statement of Objectives.<sup>16</sup>
29. In response, GBR will develop an integrated business plan across all of its activities, based on the objectives and funding estimates provided by the Secretary of State. While preparing the business plan, GBR must consult a range of parties including the Secretary of State, ORR and the Passenger Watchdog.<sup>17</sup>
30. ORR must assess GBR's draft business plan and advise the Secretary of State on whether the plan meets their objectives and whether the estimated costs offer good value for money. ORR must also publish a summary of its advice. Following ORR advice, the Secretary of State may approve the business plan. GBR must then provide ORR with the approved plan and publish it.<sup>18</sup> In Scotland, an equivalent process will apply.<sup>19</sup>

31. ORR expects the business plans to provide transparency about the activities GBR intends to carry out during the five-year funding period. This is to enable the Secretary of State, Scottish Ministers and ORR to monitor GBR's performance against the plan and inform funders' final decisions.
32. Under the Bill, the Secretary of State and Scottish Ministers have the power to postpone, withdraw or reduce financial assistance to GBR. If this variation is likely to have a material impact on GBR's ability to deliver the business plan, the Secretary of State or Scottish Ministers must notify ORR and publish details of the variation.<sup>20</sup> With the Secretary of State or Scottish Ministers' approval, GBR may amend the Integrated Business Plan in consultation with ORR.<sup>21</sup>

## **Access and use of the network**

### **The scale of non-GBR train operations and infrastructure**

33. GBR will be formed out of Network Rail and will encompass the 14 train operating companies currently contracted by DfT. GBR will operate the vast majority of rail infrastructure, as well as most passenger services.
34. Nevertheless, based on the current distribution of services, non-GBR operators are expected to remain significant users of the network, underlining the continued importance of ensuring fair access to the network. In some parts of the network, most notably in Scotland and Wales, GBR operated services will be in the minority. Around 40 entities who currently have rights to use Network Rail's network are expected to sit outside of GBR in the future model. These include devolved passenger operators, freight and open access passenger operators, and currently account for roughly:
  - A quarter of train kilometres (primarily provided by the devolved operators in Scotland, Wales, London and Merseyside);
  - A third of passenger journeys (with nearly three quarters of these attributable to the Elizabeth Line and London Overground);
  - A fifth of the track access charges currently paid to Network Rail (primarily paid by devolved operators, with freight operators paying 2% of access charges, and open access passenger operators paying 1%); and
  - 800 out of the approximately 2600 stations (the majority of which are operated by the devolved operators owned by the Scottish and Welsh Governments).
35. The Bill allows Scottish Ministers and Welsh Ministers to arrange for GBR to operate devolved train operating companies on their behalf – directly, via a subsidiary or via a jointly-

owned company. This means that the scale and nature of non-GBR services will depend on whether the devolved governments make such arrangements.

### **Access, charging and appeals**

36. The Bill makes significant changes to the legal framework for non-GBR operators seeking to access the rail network. Under the framework:

- ORR will no longer approve or direct access contracts in advance for GBR, as ORR currently does for Network Rail. Instead, GBR as the directing mind for rail will determine access to its own network;<sup>22</sup>
- ORR will also no longer determine charges or the terms of train performance incentive schemes: these will be set by GBR;<sup>23</sup> and
- The Railways (Access, Management, and Licensing of Railway Undertakings) Regulations 2016 (AMRs) will no longer apply to GBR. But ORR will continue to regulate other UK infrastructure and facility managers under the AMRs which set the rules for access to non-GBR infrastructure – meaning that the new access framework will apply to GBR but not to other infrastructure managers.<sup>24</sup>

37. Under the Bill, GBR will be required to produce an Access and Use Policy (AUP) setting out how it will make decisions regarding applications to use its network. GBR must consult ORR on issuing or revising the AUP.<sup>25</sup> GBR will also be required to produce an infrastructure capacity plan, a working timetable, a charges scheme, and a performance scheme designed to encourage GBR and operators to minimise disruption on the network.<sup>26</sup>

38. Under the Bill, provisions contained within these documents and schemes will be subject to a new ORR appeals process, as will GBR's specific decisions relating to access to infrastructure, charging or performance schemes.<sup>27</sup> ORR must evaluate appeals on the same basis as a judicial review in England and Wales, or as an application to the supervisory jurisdiction of the Court of Session in Scotland.<sup>28</sup> This means that ORR must decide the appeal on the basis of whether or not the GBR decision, policy or scheme has breached public law principles – i.e. whether GBR has acted illegally, irrationally, not followed due process or not honoured legitimate expectations.

39. If ORR upholds an appeal, it will have powers to quash GBR decisions, to order GBR to reconsider and to give GBR directions about how it should reconsider (for example by directing it to take a particular impact or statutory duty into account when it reconsiders its decision). Alternatively, ORR may substitute its own decision for GBR's – but only if GBR has made an error of law and without that error there is only one decision that GBR could have reached.<sup>29</sup>

40. The appeals mechanism in the Bill is therefore narrower than ORR's current directing role under the Railways Act 1993 and ORR's current appeals role under regulation 32 of the AMRs, in which – in the event of disagreement – ORR has broad scope to make decisions and issue directions, so as to determine access and its terms, based on its judgement and weighing its statutory duties.
41. Under the Bill, the Secretary of State will have powers to make regulations about the steps which need to be taken before an appeal is made, to set fees and time limits for appeals and to define how ORR is to carry out its appeals role. The Secretary of State must consult ORR on any such regulations.<sup>30</sup> Subject to any regulations, ORR will be responsible for developing its own processes and decision criteria and will consult on this (see “next steps” below).
42. The UK Government intends ORR to report periodically on how the access regime is facilitating private investment in rail, consistent with GBR's duties and wider objectives set by Ministers. ORR may also use its broad monitoring powers to consider and report on how GBR manages the access and use of its network by third party operators.
43. Separate from the Bill, a new GBR network code will be created to replace the current Network Code, the industry rules which set out how Network Rail and those who run trains on its network must work together e.g. on timetabling. This will enable GBR to make decisions about the content of the new code, replacing today's system where changes require broad industry consensus and ORR approval.

### **Next steps**

44. ORR has initiated a transformation programme to create an organisation fit for the future and is taking steps to adapt to its new role, promote the growth of the economy and support the successful delivery of rail reform.
45. As train operating companies move into public ownership, ORR is also undertaking statutory assessments of train operators' Safety Management Systems (SMS), the formal framework that sets out how they will meet their legal duties to manage their health and safety risks. ORR will continue this work as more operators move into public ownership. ORR will continue to engage with the relevant duty holders on the development and safety validation of GBR's SMS, to make sure changes and their impacts on health and safety have been appropriately assessed and addressed to ensure and enable a safe and effective transition.
46. ORR has also worked at pace to ensure that newly publicly owned operators hold the appropriate licences and access contracts. We will carry on with this important work to ensure continuity of train services as the remaining DfT operators transition into public ownership.

47. In parallel with the passage of the Bill, ORR will continue to work with DfT, Transport Scotland, Welsh Government, Mayoral Combined and Strategic Authorities, Network Rail, Transport Focus and all relevant stakeholders on non-legislative aspects of the reform programme:

- **The Bill's impact on what ORR does and how it does it:** ORR will develop its new policy approach to its role under the new framework, including its new and reformed functions and duties. ORR will consult on relevant aspects of its approach.
- **Monitoring and enforcement:** ORR will:
  - engage with DfT as GBR's licence is developed, alongside developing its new policy approach to monitoring GBR and making relevant changes to non-GBR licences;
  - work with DfT, the Rail Delivery Group and retailers to develop proposals for the new retail management arrangements and code of practice that provides robust safeguards to ensure that GBR acts impartially in overseeing the retail market;
  - collaborate with DfT and Transport Focus to establish the necessary arrangements for the Passenger Watchdog to be ready to exercise its new powers and functions at the point of GBR stand-up, including a Memorandum of Understanding to ensure effective coordination and transparency in how ORR and the Passenger Watchdog will work together under the new framework; and
  - work with DfT, the Passenger Watchdog and non-GBR operators to achieve consistency between their own licence requirements and the requirements on GBR.
- **New funding process:** ORR will work with funders, Network Rail and subsequently GBR on a smooth transition into the five-year funding period to ensure continuity of funding for GBR and the supply chain.

48. **Access and use of the network:** Network Rail has published a [discussion document on GBR's AUP](#). ORR will continue to work with Network Rail as it develops the AUP and engages with stakeholders including supporting Network Rail in developing its approach to assessing the economic effects of proposed open access services. ORR is currently developing its policy approach to its new appeals role and recently published [a discussion document](#) to provide an early opportunity for industry to comment on how ORR plans to carry out its new role.

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<sup>1</sup> The new duties include those set out in the Railways Bill at cl 18, cl 19 and cl 20

<sup>2</sup> Railways Bill cl 19

<sup>3</sup> Railways Bill cl 21 and cl 22

<sup>4</sup> Railways Bill cl 16(2)

<sup>5</sup> Railways Bill cl 20

<sup>6</sup> Railways Bill cl 74(2), which inserts a new section 69A into the Railways Act 1993

<sup>7</sup> GBR's functions include those set out in the Railways Bill cl 3(1)

<sup>8</sup> Railways Bill cl 7, cl 9 and cl 74(2)

<sup>9</sup> Railways Bill cl 8 and cl 10

<sup>10</sup> Railways Bill Schedule 1, para 3, which substitutes section 8 in the Railways Act 1993.

<sup>11</sup> Railways Bill cl 75(3)

<sup>12</sup> Railways Bill Schedule 1, para 5, which inserts a new section 9A into the Railways Act 1993

<sup>13</sup> Railways Bill cl 46

<sup>14</sup> Railways Bill cl 42, cl 43, cl 46 and cl 47

<sup>15</sup> Railways Bill, Schedule 2, Part 1, para 1 and Part 2 para 8

<sup>16</sup> Railways Bill, Schedule 2, Part 1, para 2 and para 3

<sup>17</sup> Railways Bill, Schedule 2, Part 1, para 4

<sup>18</sup> Railways Bill, Schedule 2, Part 1, para 4

<sup>19</sup> Railways Bill, Schedule 2 Part 2

<sup>20</sup> Railways Bill, Schedule 2, Part 1, para 7 and Schedule 2, Part 2, para 14

<sup>21</sup> Railways Bill, Schedule 2 5 (2) and Schedule 2 12 (2) (a)

<sup>22</sup> Railways Bill, cl 69 and cl 70

<sup>23</sup> Railways Bill, cl 13 (1)

<sup>24</sup> Railways Bill, cl 72 (2)

<sup>25</sup> Railways Bill, cl 59 and cl 66

<sup>26</sup> Railways Bill, cl 60, cl 61, cl 62, cl 64 and cl 65

<sup>27</sup> Railways Bill, cl 59(6), cl 60(6), cl 61(5), cl 62(7), cl 64(8), cl 65(7), cl 67

<sup>28</sup> Railways Bill, cl 68

<sup>29</sup> Railways Bill, cl 68(4)(b)

<sup>30</sup> Railways Bill, cl 68(6) and (7)

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