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HEALTH AND SAFETY COMMISSION

BECOMING A MODERN REGULATOR: NEXT STEPS IN THE LIGHT OF THE HAMPTON REVIEW AND THE SELECT COMMITTEE

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Issue

1. Refining the Commission's view on becoming a modern regulator as a response to the Hampton Review and the Work and Pensions Select Committee report on the work of the Health and Safety Commission and Executive.

Timing

2. Hampton will report in November in the form of a consultation paper for final decision by April 2005. The Commission is invited to make its views immediately.

Recommendation

3. The Commission is invited to consider its position on the possible outcomes of the Hampton review, to reaffirm its current strategy and to agree a set of principles set out in draft at paragraph 23 which it would see as the core essentials of any future regulatory model. Further to send these principles via the draft letter attached at Annex 2 and to offer to meet Philip Hampton to press home its views.

Background

4. The Commission made it clear in April, that it wanted to lead the debate on becoming a modern regulator and to think imaginatively about how the targets for health and safety could be achieved with greater efficiency and through new ways of working. At its meeting on 3 August, the Commission debated further its approach in the light of discussions with officials and the Hampton review team and the then just published Select Committee report. It asked that a paper be produced to capture more fully the arguments and issues to enable a set of underpinning principles for submission to the Hampton review to be agreed.

Argument

5. The Hampton Review and the Select Committee appear to pull in different directions. The first seeks to ensure the same (or better) regulatory outcomes with fewer inputs and to reduce the burden of compliance on both businesses and the regulator. It is concerned with the whole regulatory framework and its 70 or so independent regulators of which we are just part. The Select Committee, in contrast, concerns itself just with health and safety. It does not believe that we will make sufficient progress towards our targets without additional resources to fund increases in our activity across the piece and into new areas.
6. Although there is no dispute about the desired regulatory standard, the philosophies of achievement are very different. One emphasises more the achievement of outcomes and relies on new and imaginative thinking to secure them at lower cost. The other relies on a greater number of inputs and interventions and concentrates on their effectiveness rather than their efficiency or cost.
7. The weakness of a model seeking significant new resources is that a new and sustained level of higher resource cannot be guaranteed and, in the current climate, is thought unlikely. A failure to secure more funding and reluctance to countenance new ways of working would simply perpetuate an under-funded and less than effective model in which our efforts continued to be spread too thinly. A completely new approach, however, is untested and embraces risk. Views tend to be polarised within and outside the organisation.
8. The Commission is aware that Hampton may make recommendations which cover both the structure and style of the regulatory system. We expect Hampton to propose an overall model for regulation. He is mindful of the series of different models in each existing regulatory regime and their constant, but ad hoc rather than strategic, review and change which perpetuates the incoherence of the system as a whole, maintains the burden on business and restricts opportunities for greater efficiency and effectiveness.
9. The Commission will want to make clear what it wants from the Hampton review and to be in a position to influence its outcome. Characterising the various approaches to regulation may help the Commission to set out more clearly how it sees its role as a regulator in a broader regulatory framework and to recognise its competing demands.
10. The approaches could be thought of as points on a continuum. At one end, there is a desire to improve standards overall (a utilitarian approach) at the other, a desire to service the needs of every individual within the system (an individualist approach).

Utilitarian

11. This is about achieving overall outcome improvements in health and safety at the potential expense of the experience of individuals. It is underpinned by an assumption that broadly most people want to do the right thing for health and safety if they can. The role of the regulator, therefore, is to assist, support and advise, and understand when things go wrong. Enforcement has a role but it cannot be so demanding of resources that it skews the overall achievement of targets.

Individualist

12. This is about providing a service to individuals and meeting their expectations of a regulator. Fault and blame are strong features of this model particularly after things go wrong. The perceived role of the regulator is to enforce strongly in all circumstances and to seek retribution for failures. It assumes that people only do the right thing when forced and that personal satisfaction with the response of the regulator is a more powerful driver than reducing incidents and ill health overall.

13. The characteristics of these two models are set out in tabular form below.

| UTILITARIAN | INDIVIDUALIST |
|--|---|
| Broadly most people want to comply | Broadly most people don't want to comply |
| Business, moral and social cases are strong | Compliance is a chore with little benefit |
| Business is enabled by good advice, guidance and support | Regulation is the primary benchmark |
| The regulator is not the sole driver of improvement but looks for gearing efficiencies | The regulator is the principal driver and gearing and efficiency through others is minimal |
| Strong role for third parties, especially safety reps, and third party accreditation | Greater emphasis on command and control by the regulator, other drivers weak |
| More carrot than stick | More stick than carrot |
| More proactive than reactive and supports a prioritised risk based approach | More reactive. Priorities are time of response rather than concepts of harm which are not well understood |
| Emphasis on collective performance | Emphasis on individual performance |
| Penalties of reputation, civil law and the polluter pays | Penalties reflect value of retribution |
| A sophisticated understanding of the balance among institutional, market and societal concerns | Concern for the individual possibly at the expense of the overall system |
| Fed by the better regulation debate | Fed by individuals and pressure groups |

14. In reality, the world shifts between both points on the continuum according to changing political and societal pressure. There is strong evidence to support a balanced mixture of advice, persuasion, enforcement and business incentives to address them. The wrong balance of interventions (i.e. an extreme point on the continuum) would be counter-productive and inefficient. A regulator which is seen as overly enforcement

oriented and punitive, for example, risks losing the trust of business and their engagement and cooperation for joint problem solving. Business will become more fearful of contact to the detriment of accident reporting and openness. Equally, evidence shows that a totally educative approach is unlikely to be successful in the absence of a real threat of enforcement.

15. In defining a role for the regulator, it is also important to consider the role of others and other levers in securing regulatory outcomes. Thus, for example, giving more powers to safety reps could simply duplicate inefficiently the provision of inspectors and more proactive and reactive inspection. A solution which simply lays more interventions one on top of the other to cover the same, rather than different, turf would be illogical to an efficiency inspired Hampton review. A more strategic overview would consider how and where each should effectively be deployed. This would consider both the need for improvements in health and safety and the burdens on business.
16. The Commission's strategy recognised the difficulty of trying to balance competing demands and that it must work with finite resources to concentrate efforts where they can have the greatest effect. It recognises the things that it can do and the things that can be done by others and deals equitably with constantly evolving demands. It acknowledges that it cannot satisfy every demand and that stakeholders will challenge constantly our vires to reorder priorities according to their own interests or issues of concern.
17. The Commission is urged, therefore, to reaffirm its current strategy to Hampton and to invite him to adopt it as a broader model of a regulatory approach. It is invited further to consider the detailed approaches which can underpin this model and which would most satisfy its regulatory aims within an efficiency agenda. Some scenarios are set out in Annex 1.
18. As an example, a different model currently under discussion and which has parallels in existing regulatory regimes is one where the regulator as a preference:
 - at one end, engages more with those who demonstrate that they want to comply but lack the competency and experience to do so; and
 - at the other, increases reactive targeting of prosecutions with higher fines, to improve the efficiency and gearing of its deterrent effect.
19. A reorientation of resources in this way would require a reduction of other activity, for example, proactive inspection. Intuitively, this may seem unhelpful but this gap could be filled more efficiently by, for example, greater safety rep activity and powers, third party accreditation, earned autonomy or any combination of these.
20. This is just one example among many which may appeal to the designer of an overall regulatory system who is freed from the anchors which exist in its individual parts. The Commission is invited to consider others and their implications.

Some underpinning principles

21. The Commission made it clear at its last meeting that it is not opposed to changes in either the structure or the role of regulators but that its primary purpose is to secure continued improvements in the management of health and safety and this must be

maintained and enhanced. The Commission believes, therefore, that a set of principles is essential to underpin any new approach.

22. The Commission is opposed, however, to a model of sector based inspectorates or regimes. This would merely replace existing regulatory interfaces with new ones and prevent the more general development and application of regulatory priorities. Moreover, the business world is complex. Business is seeking to be more and more flexible and to operate across sectoral boundaries. The role of contractors in business is a good example. The concept of easily describable sectors is old fashioned and applicable only to a limited set of businesses.

23. Other key underpinning principles include:

- an evidence and risk based approach with any new approach showing evidence of better health and safety outcomes;
- a system which is outcome not input focussed;
- a system which encourages greater compliance by removing confusion, bureaucracy, barriers and costs from business;
- a system of working with LAs which is settled, feasible, workable and sustainable;
- a clear rationale for the interventions strategy;
- scope for better joined up working among regulators with demonstrable synergies;
- the tripartite approach to strategy, policy and problem solving retained;
- retaining the independence of regulators and, in our case, a clear separation between the economic and safety regulators;
- a system capable of delivering continuous improvement;
- clear articulation of the expectations of government of regulators and where the boundaries of responsibility are clearly understood.

Consultation

24. There has been limited consultation within HSE and with LAs at this stage.

Presentation

25. The Commission and LAs will be asked to make a formal response to a consultation paper in due course.

Costs and Benefits

26. We would expect any proposals for consultation to be costed.

Financial/Resource Implications for HSE

27. None at this stage.

Environmental and other implications

28. None at this stage.

Action

29. The Commission gives a steer on models of regulation and agrees a set of underpinning principles.

Annex 1

Scenarios under discussion and their potential implications

| | |
|--|--|
| <h4>Scenario 1</h4> <p>Aligning information/advice/contact through sector-centred channels</p> | |
| <p>Assumptions/Issues</p> <ul style="list-style-type: none"> • Each regulator and GD (in general) produces guidance and has channels of communication specific to each organisational or topic area – and is generally characterised by being centred on the needs of the regulator or GD and not on those of the business. • This scenario assumes that Regulators and GDs refocus their guidance to be integrated, business-focussed and business-friendly. Similarly, that Internet access is re-focussed through sector-by-sector portals – and (possibly) that a national one-stop-shop for information and advice is established. | |
| <p>Pros</p> <ul style="list-style-type: none"> • Helps resolve apparent contradictions and inconsistencies of different regulatory requirements at origin – avoiding much of the need for interpretation/reconciliation on a business-by-business basis • Reduces the burden on business • Increases the likelihood of business finding relevant information and sources of advice | <p>Cons</p> <ul style="list-style-type: none"> • There are real practical problems with establishing any effective one-stop-shop [as the general failure to implement this (undoubtedly good idea) in the past testify] • Requires a level of participation and cooperation between Regulators and GDs which would be difficult to achieve in practice and which could be overwhelmed by bureaucracy. |
| <p>Fit with HSC Strategy? Good.</p> | |

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|--|
| <h4>Scenario 2</h4> <p>New models to secure compliance e.g. generalised ‘earned autonomy’ combined with new deterrent penalties for poor performers</p> |
| <p>Assumptions/Issues</p> <ul style="list-style-type: none"> • In principle, all regulators should focus on poor performers and areas where the harm is potentially the greatest • The proposition is that if businesses can demonstrate that they have the risks of ‘harm (of whatever kind) under adequate control then they can benefit from less intrusion by regulatory bodies • A key concern is that the effort to achieve the autonomy (theoretically) on offer is more burden than the benefit obtained – and that each regulator or (part of) a Government Department might require different hurdles to be jumped to qualify for ‘autonomy’ in each area of regulatory activity. • This scenario assumes that a proportionate, unified/generalised approach can be adopted to secure a designation of competence which (subject to periodic audit/monitoring of some sort?) would entitle the holder to much reduced burden of regulatory activity from all/most regulators. |

| Pros | Cons |
|--|---|
| <ul style="list-style-type: none"> • Offers an opportunity/incentive for good performers to demonstrate their competence and obtain relief from regulatory burdens • Rewards good performance/behaviour • Enables regulators and GDs to focus their resources on poor performers • Could provide a hook on which to hang variable insurance premium rates (ELCI and public liability) thus strengthening the insurance 'lever' | <ul style="list-style-type: none"> • Will be difficult to get agreement among regulators, GDs (and possibly in the public and political arena) as to what would enable such 'autonomy' to be justified (e.g. ISO 9000 provides a basis for quality systems but is more about reproducibility of product – not the quality or acceptability of the product or the way it is produced) • Businesses with 'autonomy' will still experience harmful incidents |
| <p>Fit with HSC Strategy? Good.</p> | |

| <h3>Scenario 3</h3> <p>A common model for working with LAs</p> | |
|--|---|
| <h4>Assumptions/Issues</h4> <p>Different national regulators, central Government departments, etc. would coordinate their approaches to and requirements of local authorities – and establish priorities within resource 'envelopes' for regulatory inspection and enforcement – and present a united, coherent and costed position to LAs.</p> | |
| Pros | Cons |
| <ul style="list-style-type: none"> • LAs would get a clear, prioritised set of requirements (avoiding the need to make sense of disconnected competing demands at each LA) • Should enable performance to be monitored better – possibly within CPA • Should identify (and eliminate) duplication and enable challenge of low priority/benefit work • Reduces scope for local interpretation and meeting locally perceived priorities • Provides basis for establishing resource envelope for LA delivery • Could be achieved within existing legal framework • Prevents one bit of government trumping another for LAs' time and resources | <ul style="list-style-type: none"> • Introduces a new layer of process and potential bureaucracy • Reduces scope for local interpretation and meeting locally perceived priorities • LAs may perceive this as more central control |

Fit with HSC Strategy?

Fully in line with need to provide better coordination of activity between HSE and LAs; working with and through others and concentrating on higher priority/benefit work

Scenario 4

Merger of one or more regulators

Assumptions/Issues

There are a considerable number of government and LA regulators. This scenario assumes that the number is rationalised according to perceived families of regulators. HSE, the Environment Agency and the Food Standards Agency and the relationship of each with LAs have been linked together in discussion so far. It is assumed that each would be resistant to a merger.

Pros

- Potential for reducing interfaces with regulated businesses
- Potential for harvesting efficiencies from combining support services; estates (using 'best of breed' systems)
- Appearance of radical action to streamline regulatory approaches to business
- Would impose imperative on rationalising regulatory philosophies, practices
- Reduces number of 'quangos'
- Scope for further rationalisation of approach following merger

Cons

- Need for primary legislation
- Administratively complex
- Possible dilution of regulatory focus in some specific areas (e.g. the avowedly consumer focus of the Food Standards Agency)
- Logistically difficult

Fit with HSC Strategy?

Provided new organisation adopts vision, mission, aims etc. – may provide a good fit – and may facilitate new approaches outlined in the Strategy.

Scenario 5

Introduction of new Multi-purpose Regulators

Assumptions/Issues

- Regulatory bodies may deliver their mission through a combination of their own inspectors/other field staff (both generalist and specialist) and/or through LAs (who brigade their regulatory functions into different groupings of inspectorates/functions according to geography; size; nature/size of regulated parties; local priorities and predilections; etc.)
- This scenario envisages pooling (almost) all inspection and other field activity into a new national, but geographically dispersed, body. Existing 'specialist' regulators and Government Departments would 'contract' to deliver their field activity requirements through the new body (which would provide function-specific training; and manage efficient delivery, integrating the various requirements, through a single multi-purpose 'inspectorate').
- It would be expected that the Regulators and GDs would retain responsibility for policy and direction and retain small cadres of particular specialist staff/functions/inspectors for specific areas of work (e.g. nuclear licensing) or as a deep-specialist resource which could be called on to support the more generalist role of the new delivery body.

Pros

- The vast majority of businesses will see a single inspection and enforcement body fulfilling a variety of different purposes
- The Delivery Agency can concentrate on efficient and effective delivery – with a flexible delivery work force
- Regulators and GDs can concentrate on policy, strategy, specifying regulatory requirements and assessing impact/effectiveness
- The overall size of the delivery body would define the resource/activity envelope – what is done within it would be established by negotiation against a process of rigorous prioritisation
- Overcome problems on inconsistency in (and approach to) delivery across 400+ LAs and many other regulators, GDs

Cons

- The governance of the new body might be problematical (e.g. how would the various demands of regulators and GDs be weighed and prioritised?)
- Risk of dumping down – general purpose Inspectors/field staff might be seen by business as being 'jack of all trades, master of none'
- Could be achieved within existing law (needs to be checked – but the Government can set up new agencies/NDPBs and the HSC can enter into agency agreements for delivery of its functions with other bodies)
- Loss of LA involvement and ability of local democracy to influence local priorities

Fit with HSC Strategy? Good

NB Various variations on this model exist including: separating enforcement from advice, inspection from investigation and policy from delivery.

Scenario 6

A new government department of regulatory policy

Assumptions/Issues

Regardless of the chosen delivery model regulatory policy would be combined into one central government department to deliver an overall approach to the scope and philosophy of regulation.

Pros

- An opportunity to harmonise approaches, philosophies and bureaucracies
- A place to answer the big questions about when, why and how the State intervenes through regulation
- A central point for complaints and arbitration
- Centrally determined priorities
- Better design of interfaces and reduced duplication
- Common view on penalties

Cons

- Overall landscape may be too large to manage
- One size may not fit all
- Perceived loss of independence
- Cost and logistics

Fit with HSC Strategy?

The role of the Commission as a champion for health and safety becomes unclear

Annex 2

Draft letter from Chair to Philip Hampton

The Health and Safety Commission has maintained a close interest in your review of regulators. I know you have seen the Commission's strategy for work place health and safety and some of our early thinking on becoming a modern regulator which has progressed in parallel with your own thinking. You have also met with me, and HSE officials on a number of occasions, including visiting businesses under our control.

At its last meeting on 7 September, the Commission restated its preparedness to consider different models of regulation (and different structures to give them effect) if these would result in benefits for health and safety. To ensure this, the Commission believes that any proposals you make should be underpinned by a set of key principles. These include:

- an evidence and risk based approach with any new approach showing evidence of better health and safety outcomes;
- a system which is outcome not input focussed;
- a system which encourages greater compliance by removing confusion, bureaucracy, barriers and costs from business;
- a system of working with LAs which is settled, feasible, workable and sustainable;
- a clear rationale for the interventions strategy;
- scope for better joined up working among regulators with demonstrable synergies;
- the tripartite approach to strategy, policy and problem solving retained;
- retaining the independence of regulators and, in our case, a clear separation between the economic and safety regulators;
- a system capable of delivering continuous improvement;
- clear articulation of the expectations of government of regulators and where the boundaries of responsibility are clearly understood.

The Commission would be happy to explore these thoughts in greater detail with you. We are not persuaded, however, of a case for further sector based inspectorates or regimes. This approach would merely replace existing regulatory interfaces with new ones and prevent the more general development and application of regulatory priorities.

The Commission is looking forward to the results of your deliberations and to responding to you more formally in due course. In the meantime, we are keen to support your review in whatever way we can. I would be pleased to invite you to meet with the full Commission so that we can share with you more fully the unique perspective that we bring to oversight of the current health and safety system.