

REGULATORY JUSTICE: SANCTIONING IN A POST-HAMPTON WORLD - QUESTIONS FOR CONSULTATION

1. Do you agree that criminal prosecution and the criminal courts should be reserved for the truly egregious offenders or where regulatory breach leads to severe actual or potential external consequences?

Yes. HSC expects that, in the public interest, enforcing authorities should normally prosecute, or recommend prosecution, where, following an investigation or other regulatory contact one or more of the following circumstances apply –

- Death was the result of a breach of legislation
- The gravity of the offence, taken together with the seriousness of any actual or potential harm, or the general records and approach of the offender warrants it
- There has been reckless disregard for health and safety requirements
- There have been repeated breaches which give rise to significant risk or persistent and significant poor compliance including where relevant warnings from employees, or their representatives or from others affected by the work activity have been given.
- Where, in the public interest, it is appropriate in the circumstances as a way to draw attention to the need for compliance with the law and the maintenance of standards required by the law, and conviction may deter others from similar failures to comply with the law
- Work has been carried out without or in serious non-compliance with an appropriate license or safety case
- Duty holders managing standard for health and safety far below what is required in law and gives rise to significant risk
- Failure to comply with an improvement notice or prohibition notice or repetition of breach of formal caution
- False information supplied willfully or an intent to deceive which gives rise to significant risk
- Inspectors have been intentionally obstructed in the lawful course of their duties

2. Do you agree with the vision that is laid out in Figure 1.3 of a contemporary regulatory enforcement toolkit?

Yes, we agree with the vision of a richer range of sanctioning tools supporting risk-based enforcement. However, it is important that Regulators are able to use new or existing tools most likely to achieve the purpose of enforcement without placing unnecessary burdens on themselves or those they regulate, and which do not involve an opportunity cost that outweighs any potential benefit. For HSC, the purpose of enforcement is to –

- Ensure that duty holders take action to deal immediately with serious risks;
- Promote and achieve sustained compliance with the law;
- Ensure that the duty holders who breach health and safety requirements, directors and managers who fail in their responsibilities, may be held to account.

We suspect certain penalty options – for example, fixed monetary administrative penalties - may well not suit our enforcement environment or complement our current regulatory regime.

3. Do you agree or disagree with the ‘Penalties Principles’ proposed in chapter one?

We agree with these Principles. HSC’s enforcement principles are enshrined in its Enforcement Policy, and we see a great deal of congruence with the proposed Penalties Principles. Any penalties principles are also underlined by public expectation of those duty holders who breach health and safety being held to account and punished.

If you disagree with one or all of the Principles listed below, please elaborate:

We agree with all the Principles, therefore this section is not applicable.

- a. Principle # 1 – Sanctions should **change the behaviour** of the offender to prevent regulatory non-compliance.
- b. Principle # 2 – Sanctions should **eliminate any financial benefit** or benefit which was the result of regulatory non-compliance.
- c. Principle # 3 – Sanctions should be **responsive and take into account what is appropriate for the particular offender and the particular regulatory issue**.
- d. Principle # 4 – Sanctions should be **proportionate** to the nature of the offence and the harm caused
- e. Principle # 5 – Sanctions should include an element of ensuring that the **harm caused by regulatory non-compliance is put right**.
- f. Principle # 6 – Sanctions should aim to **deter future non-compliance**.

4. Are there any principles that should be added to this list? If yes, please provide details, including supporting comments and evidence.

We think not, if consideration of what is appropriate in the public interest is covered in Principle #3

5. Do you agree that a regulator must ensure the following characteristics to be present in order for a sanctioning regime to be most effective?

Please see below.

a. The regulator should have a published enforcement policy

Yes

b. The regulator should attempt to measure regulatory outcomes (such as compliance rates) and as well as outputs (such as the number of enforcement actions taken)

Yes where this is possible and the benefits far outweigh the resources inputted. Incidence rates of injury and ill health may relate to regulatory action, but there are many other factors which affect such rates.

c. The regulator should be able to justify the enforcement actions they take

Regulators should be able to justify the enforcement action they take, and do not take, and have a mechanism to clearly explain the criteria the decision was arrive at.

d. The regulator should follow up enforcement actions

Regulators should follow up enforcement action to ensure sustained compliance.

e. The regulator should be transparent in the enforcement actions it takes

HSC believes in firm and fair enforcement of health and safety law. This should be informed by the principles of proportionality, consistency, targeting, accountability and transparency – about how the regulator operates and what those regulated may expect.

f. The regulator should be transparent in the methodology it uses for setting and calculating monetary administrative penalties.

Yes – where these are used. As in (e) above, all regulators should be open and transparent in the methodology for setting and calculating decisions relating to enforcement criteria.

6. How should regulators be required to report their performance and progress against their enforcement strategies?

HSC has openly reported enforcement and performance statistics yearly and reported openly on progress against strategies and targets. Regulators should be required annually and/or in manner which seeks the best advantage for improvement to the regulator and understanding of objectives to the regulated.

7. Should regulators make a more focused effort to communicate their strategy for targeting businesses that are deliberately non-compliant? If yes, how should they approach this?

Regulators should engage with their stakeholder groups to ensure their enforcement strategies are effectively communicated and to develop approaches that target those who are deliberately non-compliant.

8. What can be done to capture the rogue elements within industries?

HSC would welcome better exchange of information between regulators and government departments and enhanced partnerships to identify and target rogue elements within industry. Greater resources to work with and encourage stakeholders to assist in identifying and targeting rogue elements are needed. However, it is arguable that out-and-out rogues are indulging in behaviour that is properly criminal and falls outside the regulatory system, and is better targeted by the police and mainstream criminal prosecutors.

9. Is there need for increased investigative powers to be afforded to regulators to better deal with rogue businesses?

HSC would actively encourage use of appropriate powers for regulators to enable them to ensure sustained compliance and create a level playing field in business. Both HSE and Local Authorities already have extensive powers to deal with rogue businesses. For both HSE and Local Authorities this issue may be better addressed by sentencing in the courts.

10. Should due diligence defences be included in all areas of criminal offences involving regulatory breach?

In the health and safety context this would not be appropriate. If 'reasonable practicability' were to be replaced with a 'due diligence' test, the resulting subjectivity would make the task of persuading magistrates and jurors to be satisfied to the criminal standard disproportionately burdensome for those responsible for maintenance of workplace health and safety. The courts have examined the question of reverse burdens at some length and decided that the current provisions are both fair and justified.

11. Would more training be appropriate for judges in the area of regulatory non-compliance and appropriate sentencing?

Health and Safety cases are a specific and unique aspect of criminal law. HSC would welcome specific judiciary training in areas such as these.

12. Should sentencing guidance be prepared for areas of regulatory non-compliance?

A number of decided cases have established guidance (rather than tariffs) for HSWA cases, but we remain concerned that Courts are prepared to impose considerably greater fines in, for example, financial misfeasance cases than where there has been a workplace death.

13. Should the fine maxima in criminal courts be abolished? Should a cap be set?

HSC has openly advocated a need to increase health and safety penalties. Any method, which ensures health and safety offences are consistently and proportionality fined in accordance with the severity of the breach, would be welcomed.

14. Should the cap follow the principles laid out in the Competition Act 1998, which provides that administrative penalties may not exceed ten percent of the relevant turnover of the undertaking concerned?

We are not able to comment on whether a cap should follow these principles, but any such arrangements should avoid being overly complicated

15. Should profits gained from non-compliance be subject to a separate profits order which is intended to remove any economic gains from non-compliance as well as a separate fine element?

We accept that it may be appropriate for courts to have such powers available to them. In the health and safety regulatory system it can be difficult to attribute and calculate economic gain directly to non-compliance, however, there are circumstances where this can be done e.g. asbestos removal, gas work and construction work where scaffolding should have been provided.

Monetary Administrative Penalties (MAPs)

16. In general, do you agree that regulators should have Monetary Administrative Penalties available to them as an additional sanction option in their enforcement toolkits? If no, then please elaborate on your views.

Dependent on a range of factors, fines in themselves will not deal with the immediate risk posed by a breach in health and safety law. Investigation to instigate a fine may well be the same as that for a prosecution and therefore, would not be time saving for the regulator. To obtain enough evidence to apply a fine but not to contest in a court or in a tribunal would be risky. Any time lag between evidence gathering may well add additional cost to the cost of gathering evidence at the time and jeopardize the regulators ability to the 'best evidence'. Both the FMAP and VMAP systems could be time consuming if the process went all the way to appeal and would be expensive if the appeal was lost. It seems unlikely that, unless there is some central structure, that these penalties will provide, as you suggest a 'low-cost sanctioning option'. There may also be some issues for regulators that they are not seen as a revenue collector. The process of applying and calculating the fines would have to be transparent and ensure a consistency of application. Costs would also be incurred by the regulator to ensure that an adequate database is in place to record previous fines. Any fines imposed would have to be large to benefit the system.

We do however, see some advantages of a MAP system. A financial penalty may well change some duty holder's behaviour and save court time. The regulator too may find it quicker and faster than proceeding to court but the issue of evidence gathering, made in the paragraph above, remains. A variable financial penalty would also give the regulator the ability to match the penalty to the breach. We feel a fixed penalty would not achieve this aim. A financial penalty would enable the regulator to publish the breach and may well help and may well help transparency of enforcement with regard to victims and employees.

17. Do you prefer Model # 1 (paragraphs 3.40 – 3.44), Model # 2 (paragraphs 3.45 – 3.47) or Model # 3 (paragraphs 3.48 – 3.51).

Please explain why you would prefer one particular model?

HSC has an open mind on the three models proposed, and does not have a preference for any particular model.

18. Should regulators have FMAPs available to them? For what types of offences (either in general or giving specific examples) would they be appropriate? What level of financial penalty would be appropriate for FMAPs?

Yes, in principle. In practice, though, we think FMAPs are unlikely to be of benefit in the health and safety regulatory system.

19. Should regulators have VMAPs available to them? For what types of offences (either in general or giving specific examples) would they be appropriate?

Yes, in principle. VMAPs may be appropriate for less serious breaches and where risk is low.

20. Should the level of VMAPs be determined with regard to one or more of the following aggravating or mitigating factors:

- Financial gain made by the offender
- Offender's past record of compliance
- Annual turnover of the offender
- The co-operation of the offender
- The timely and accurate reporting of the issue
- Timeliness of corrective action
- Please provide other relevant factors which you feel should be included.

Yes, but a combination of these factors may mean that an administrative fine is not appropriate. The scale and nature of the breach should also be a determining factor.

21. Should the level of VMAP be unlimited?

Yes, but clear criteria need to be set out for their determination.

22. Should the maximum level of VMAPs set out in legislation be capped to never exceed ten percent of the relevant annual turnover as per the details of the Competition Act 1998?

As previously mentioned, any such arrangements should avoid being overly complicated.

23. Should there be provision to supersede the cap if the financial benefit is greater than the capped amount?

Any such arrangements should avoid being overly complicated.

24. Should there be an option for settlement as an alternative to a MAP? In what sort of cases should this be considered?

If any such arrangements were in place they should avoid being overly complicated.

Enforcement Notices

25. Should regulators follow-up statutory notices such as Enforcement or Improvement Notices on a risk adjusted basis?

We agree with the argument that failure to follow up such notices to check that compliance has been reached undermines their value as a sanctioning tool, and will encourage those who are reluctant or unwilling to comply not to treat them seriously. We think that it should be possible to incorporate a risk-adjusted basis for follow-up arrangements.

26. If a statutory notice is not complied with, should regulators be able to apply a Monetary Administrative Penalty for non-compliance with an Enforcement Notice?

We take the view that non-compliance with an enforcement notice is a serious matter and where this occurs, a prosecution should normally follow.

27. If a regulatory appeals tribunal exists, should appeals for statutory notices be heard in this venue?

Yes – we believe the current arrangements for appeals against health and safety enforcement notices, involving employment tribunals, are a good model.

Enforceable Undertakings and Undertakings Plus

28. Do you think Enforceable Undertakings are a good alternative sanction to have available to regulators?

The Commission sees many potential benefits with Enforceable Undertakings (EU). EU's may work well not only as an alternative sanction but as an additional sanction to our current regulatory tools. We particularly see the benefit of EU's in larger organisations or relating to larger events that involve public and societal risk. EU's would fit well with our existing tools to help improve

management failing issues especially on a national scale. An EU agreement would allow proportionality with the breach and the defendant's resources. Small duty holders may also be encouraged by the principle of agreeing a defined strategy which is clear, objective and measured.

EUs could provide scope and benefit to agree restorative and community elements. EUs could fit well with our existing regulatory tools e.g. Improvement Notices as well as any new tools a regulator may wish to adopt e.g. financial penalty (EU Plus) and adverse publicity orders. EUs should have the potential to encourage a higher level of compliance beyond the regulatory standard. This would make EUs a powerful tool in seeking sustained compliance.

The EU option promotes openness of organisations and transparency of the enforcement process. Developing and agreeing a defined way of redress should encourage corporate social responsibility and enable rehabilitation of the corporate body and managers.

In adopting an EU option for the toolkit there would inevitably be a cost to the regulator in training key personnel and in monitoring any EUs undertaken. Any EU undertaking should be backed up by the ability of enforcement including prosecution, following non-compliance.

29. Does the described model suggest the correct key elements for introducing Enforceable Undertakings in the UK?

Yes. The key elements for introducing EUs should include the principle that the regulator's costs are recovered, including the costs of monitoring compliance with the EU.

30. Should business be able to apply to the regulator to enter an Enforceable Undertaking or should it be solely at the discretion of the regulator to suggest an Enforceable Undertaking?

We see merits in both options. The process needs to be transparent with clear criteria, which must be met before an EU can be accepted. The regulator should have discretion to propose or decline an EU.

31. Should Enforceable Undertakings be disclosed publicly? Should regulators follow-up Enforceable Undertakings?

Yes. We believe both the existence of an EU and its terms should be disclosed publicly, in the same way as health and safety enforcement notices and convictions currently are. Our experience is that the knowledge that this information will be placed in the public domain is a significant deterrent factor.

32. Would Enforceable Undertakings in principle be appropriate for all types of offences, or are they more appropriate for particular types of offences (please provide details of types of offence or specific offences)?

EUs may be appropriate for most health and safety offences, but there will be factors relating to the regulatory breach giving rise to the offence that may make an EU inappropriate – such as recklessness, poor management practices, or persistent non-compliance, or where there has been a fatality or serious injury.

33. Should enforceable undertakings be accompanied by a Monetary Administrative Penalty in order to effectively sanction serious offences?

We have an open mind on the practicality of this option. We anticipate that compliance with an EU will cost an organisation considerably more than the amount they could expect to be fined in court, so that any financial gain from non-compliance will be negated by the EU itself. And offences that are sufficiently serious will continue to be prosecuted in line with our Enforcement Policy.

34. What sort of conditions on a business should an Enforceable Undertakings seek to impose?

In the health and safety system, an EU should provide significant and real benefits to workers, industry and the community, and the conditions it imposes on a business might include:

- acknowledging that the regulator alleges a breach has occurred;
- identifying the facts and circumstances of the alleged breach;
- providing an assurance about future behaviour; and
- establishing or maintaining an occupational health and safety management system at the workplace which is subject to third party audit at regular intervals.

Restorative Justice

35. Do you agree that Restorative Justice is something that can be applied to the area of regulatory non-compliance? Please elaborate on your views.

Elements of restorative and restitutive justice are amongst the significant benefits associated with EUs, as previously mentioned in paragraph 28, and also Conditional Cautioning currently being piloted and evaluated in the criminal justice system. RJ should not be a substitute for prosecution but may well benefit our current regulatory regime as a pre court option prior to prosecution.

Outside this context, RJ used in conjunction with other enforcement tools may provide a good framework to proportionately match the breach, and involve and meet the needs of victims e.g. rehabilitation, workers retraining, reassurance and support, closure and public support. RJ would enable an organisation to do the right thing quickly. RJ may well result in improvements in health and safety outcomes in businesses as well as educate the organisation and managers. An RJ conference would be transparent with justice seeing to be done and act as a good vehicle of communication to the workforce and business of the breach and subsequent agreement. We see RJ being most effective where breaches involve community risk. It may be particularly useful in the public sector where, in conjunction with a prosecution, actions and agreements help to produce an effective punishment of a public service body.

RJ has its limitations. Successful outcomes would be highly reliant on the willingness of parties to participate and seek agreement. While the potential process of senior managers talking directly to the victim(s) would aid the health and safety message and get best fit recourse the issue of civil liability admission and disclosure would have to be resolved.

Any RJ system would be highly reliant on a centralised government framework. There would also be a cost to regulator in training key personnel and participating. Any RJ agreement would also have to be monitored which may well fall on the regulator.

36. For what types of offences would it be appropriate?

RJ may be appropriate for some fatal, major or minor injuries or where the breach exposed individuals or communities to major risk but there has been no consequence. RJ should not be a substitute for prosecution but may well benefit our current regulatory regime as a pre court option prior to prosecution. We believe RJ – in the sense of a process, rather than a sanction – may provide an opportunity for restitution, rehabilitation and reconciliation for offences that involve fatal accidents or serious injuries. But it would have to be entered into by both parties on a voluntary basis.

37. Do you agree with Option #1 (paragraphs 5.27 – 5.29) of RJ as a pre-court diversion? If you disagree, please elaborate on your views.

In the health and safety context, there is a danger that RJ as a pre-court diversion would be seen as working in favour of the employer, allowing organisations to exploit the master/servant relationship with employees in order to avoid proper punitive sanctions. Having said this, RJ would best work in this diversionary context providing the restitution matched the scale and consequence of the breach, and was adhered to.

38. In what cases or for what offences would the use of RJ as a pre-court diversion be appropriate?

As stated in Question 36. And in cases involving risks to the public.

39. Should RJ be an alternative to administrative penalties as set out in Option #2 (paragraph 5.30 - 5.31)? In what cases or for what offences would it be appropriate?

RJ should be offered to defendants and victims. The option of a restorative conference instead of a fine may well benefit the injured party in some circumstances and obtain a higher level of sustained compliance. However, it should be up to the regulator to decide when to offer RJ as an alternative.

40. Do you agree with Option #3 (paragraph 5.32) of RJ having a role within the criminal justice system when dealing with regulatory non-compliance? Please elaborate on your views.

We agree RJ could have a role as proposed in Option 3 – i.e., within the criminal justice system. At both the pre-sentencing stage and post-sentencing, the court should be able to consider whether a RJ option would be appropriate and whether either the victim or the defendant would feel 'obliged' to enter the process given the circumstances.

a. Could it be used at the pre-sentence stage?

RJ would be best used at the sentencing stage especially if it was prior to the court appearance.

b. Could judges include an RJ element as part of a sentence?

This may well work. However, RJ is most effective when both parties are in agreement to the process. It would neither be fair to the victim, organisation or the regulator if unwilling parties were to be asked to partake in RJ. Similarly it would be a good use resource of court time or the regulator's resource.

41. In what cases or what types of offences would the use of RJ as part of a criminal proceeding be appropriate?

As stated in Question 36.

42. Should regulators undertake pilots to explore the potential of Restorative Justice to improve outcomes for victims, offenders, and communities in business regulation?

Yes, but funding for such pilots would presumably need to come from offending organisations or from a central source.

43. Who should contribute to the cost of the RJ process?

RJ should be set up in a Centralised Government Framework. The cost of any RJ process, such as RJ conferences piloted in the Youth Justice system, should be borne by the offending organisation. Where, in circumstances this is inappropriate e.g. a sole trader, it should not fall to the regulator, but be paid from a central government budget.

44. What safeguards are necessary in the RJ process?

Any RJ conference should be independently administered by trained facilitators. The Regulator along with the facilitator should assess the fairness and proportionality of the outcome of the conference should be assed by the regulator to prevent an unbalanced decision in light of the breach. This would be particularly necessary when the regulator (Option1) instigates any pre – Court RJ process. Any outcome from the agreement would reflect on the regulators view of the breach.

Further recourse, following a failure to reach a satisfactory agreement must be in place. To effect an open and honest discussion to seek closure the issue of civil liability admission and disclosure should be resolved. Similarly support for the victim should be on hand during and after any conference.

45. Does Restorative Justice have a role to play in remedying regulatory breaches where no identifiable individual victim(s) exists such as in cases of environmental damage?

See Question 36.

46. RJ is a voluntary process, so should it ever be suggested by a judge or a regulator as an alternative to a more formal sanction?

Yes it could be used as an alternative to a formal sanction. Judgment should be reserved on the use of the formal sanction until the outcome of any RJ process has been assessed by the regulator or judiciary and the agreement has been completed and verified.

47. Will corporate or business offenders be under pressure to accept an offer to enter into an RJ process because it is seen as a lesser or softer alternative?

This depends largely on the culture and nature of the defendant. However, as stated previously willing participants who seek genuine restorative recourse would be best suited. The nature of RJ outcomes would hopefully, help to deter those wishing to seek an easy option. The role of the regulator may well be crucial to ensure consistency of outcome.

48. What should happen if a company does not adhere to the agreed upon outcomes of an RJ process?

Where the failure to comply is significant to the agreed outcome and not due to circumstances beyond the foreseeable control of the defendant, the breach should be tried by alternative means taking in to account the aggravating factor of the failure by the defendant to fulfill their contractual obligations in the RJ process. The aggravating factor should also take in to account any additional harm which may have been caused to the victim and time and resources of those involved in the process.

Alternative Sentencing in Criminal Courts

49. Are financial penalties or imprisonment adequate sanctions for addressing regulatory non-compliance in a criminal setting?

Yes – under the appropriate circumstances.

50. Why do judges not use other legislative provisions for alternative sentences such as compensation orders?

In serious injury (and fatal) cases which are the 'top tier' for which prosecutions are reserved, the Judges cannot be expected to consider the complex question of quantification of compensation. Such cases are invariably being dealt with as civil claims in parallel, so any award of compensation in the criminal court would be liable to be offset against any subsequent award by the civil court, rendering the exercise otiose.

51. Should judges be afforded a broader range of sentencing options to deal with companies and individuals who have not met their regulatory obligations?

Yes - as long as those options have been examined by the regulator and stakeholders to ensure that the proposed penalties principles are met, and that it helps lead to sustained compliance, and not an over-bureaucratic burden on the regulators or its resources.

52. Are financial penalties alone sufficient to deter companies from not complying with regulatory obligations?

No, there has to be a range of penalties, including sanctions such as disqualification and imprisonment. Such a range of sanctions provides both the flexibility and driving motivators to deter and justly penalise those who have breached the law.

53. Should regulators and government departments look to amend their legislative provisions to extend the sanctioning options available to judges?

Yes where the sanction would be best dealt with in the Courts.

54. Would the following potential extended sanctioning options be appropriate for sentencing in cases of regulatory non-compliance?

a. Publicity orders

Publicity orders would be a complimentary tool to assist in improving levels of sustained compliance. It is envisaged it would have the greatest impact on those organisations with a high reputation driver. Any publicity order would have to take in to account the feelings of the victims before issuing. Considerable and careful drafting of any framework of what the substance of any publicity order would be like would have to occur.

b. Corporate rehabilitation orders

It is not clear how these would fit as a sentencing option in our current regulatory system. Enforcement Notices would be used where action was needed by the duty-holder to achieve compliance. Any corporate rehabilitation orders would need a central framework to operate. The cost to those monitoring compliance e.g. the regulator, would have to be considered.

c. Corporate probation orders

This may help to act as a deterrent. However, the evidential collection would have to be the same as that for a prosecution in case any order was breached.

d. Mandatory audits

These may work well in larger organisations. If not involving the regulator strict standards of verification would have to be in place.

e. Community service orders

These may be appropriate for small firms and individuals.

f. Remediation orders

These could be appropriate in addition to a fine for non-compliance with an enforcement notice.

55. Which offences would be appropriate for alternative sanctions?

There is a range of factors, such as repeat offending, which in addition to the type of breach will influence decisions as to whether alternative sanctions are appropriate. Such decisions will have to be taken in line with the Regulator's Enforcement Policy.

56. Which firms would be considered appropriate for alternative sanctions?

The Regulator will need to be confident that a firm would be able to achieve long-term compliance in response to an alternative sanction.

57. Do you have any suggestions for other types of sanctions that should be considered, not mentioned on the above list?

No

58. Should judges seek to remove all of the financial benefit obtained as a result of regulatory non-compliance in their sentencing through a profits order plus a fine?

We agree with the Principle that there should be no financial benefit obtained as a result of non-compliance, and use of a profits order may be an effective means of ensuring this.