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HEALTH AND SAFETY EXECUTIVE
Senior Management Team
HSE Interaction with the Local Better Regulation Office
Advisor: Tony Hetherington
Cleared by Phil Scott on 30 March 2008

Issue

1. The Chair of the HSE Board requested a paper to update HSE Board colleagues on the interactions with the Local Better Regulation Office and, more specifically, the LBRO draft strategy.

Timing

2. For clearance at the 7th May 08 meeting prior to circulation to HSE Board members.

Recommendation

3. The SMT is invited to consider the attached draft paper and agree its circulation to the HSE Board prior to their next meeting (27/28th May).

Background

4. See attached draft paper

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Health and Safety Executive Board					
Paper Number:	MISC/08/10	FoI Status:	Open	Internet Embargo:	None
HSE's Interaction with the Local Better Regulation Office					

Purpose of this paper

1. To inform Board members of HSE's current engagement with the Local Better Regulation Office (LBRO).

Background

2. LBRO was set up by the Government to improve the way that local authority regulatory services operate, ensuring that unnecessary burdens on compliant businesses are reduced without compromising the protection offered to consumers, workers and the environment. LBRO will be particularly engaged in Trading Standards, Health and Safety, Food, Fire Safety and Licensing regulation undertaken by Local Authorities. LBRO is already active and will be fully constituted on the passage of the Regulatory Enforcement and Sanctions Bill through Parliament
3. HSE's Local Authority Unit (LAU) has led on engagement with LBRO to ensure that LBRO take account of our experience of working in partnership with LAs as co-regulators of health and safety. In doing this we have co-operated with Local Authorities Coordinators of Regulatory Services (LACORS).

Argument

4. LAU has engaged with LBRO in three main ways
 - Maintaining a dialogue with LBRO's Chief Executive and Director of Policy and Engagement;
 - Commenting on LBRO's Draft Strategy 2008-11; and
 - Supporting LBRO's work in the development of a "world-class local authority regulatory services system".
5. **Dialogue between HSE and LBRO:** Key lines of communication have been established between HSE and LBRO. LBRO propose to appoint an account manager to ensure links with HSE are maintained and it's proposed that they attend the HSE/LA Enforcement Liaison Committee (HELA). LBRO wish to develop MoUs with all key regulators, including HSE, although they do not expect to progress this work until late 2008/early 2009.
6. **LBRO Draft Strategy 2008-11:** LBRO consulted on its draft strategy in January 2008 (consultation closed March 2008). HSE's comments are attached as Annex A. The general line taken was supportive of the main aims : ensuring interventions are risk-based and not unnecessarily burdensome on business; that the benefits of efficient regulation are not as widely recognised as they should be and work needs to be done to achieve this; that interventions with nationally-operating companies need to be better coordinated. However, we were able to provide significant practical comment based upon our experiences of working in these areas in relation to health and safety enforcement.

7. World-class LA regulatory services system: HSE recently contributed to this LBRO initiative by taking part in a workshop with other regulators. The aim of the workshop was to define and shape the characteristics of a world-class local regulatory system. LBRO's report of the workshop is attached at Annex B. We have also provided material to illustrate the structures HSE has in place to support the health and safety regulatory system covering topics including the Enforcement Policy Statement, the Enforcement Management Model, Large Organisation Partnership Pilot (LOPP), the S18 standard and information on the attributes of a regulator, as developed by the Senior Labour Inspectors Committee (SLIC). A theme for us has been to ensure that maintaining the protection afforded by a regulatory regime is also important when considering the balance against the burden of compliance.

Consultation

8. This paper was prepared in discussion with Mark DuVal of LACORS.

Next steps

9. HSE LAU will continue to engage with LBRO to ensure we are up-to-date with LBRO's thinking on relationships between central and local regulators. We will progress with the development of a MoU to LBRO's timetable. Progress with any MoU, or any matters of similar significance, will be reported to the Board as they develop.

Clearance

10. The paper was cleared by the SMT on 7 May 2008.

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Local Better Regulation Office**Draft Strategy 2008 – 2011****Comments from the Health and Safety Executive****General comments**

HSE supports the aims of LBRO and is pleased that the period of its establishment has been characterised by a growing and positive working relationship between us. HSE's experience of working with Local Authorities, and in particular our partnership programme of the past few years, put us in a strong position to contribute to LBRO's strategic objectives.

HSE welcomes the recognition that regulatory services contribute significantly to economic prosperity and community well-being.

We also welcome the recognition that the costs of business compliance must be balanced against the consequences of failure to meet a minimum legal standard (death, injury and ill health in the case of health and safety legislation).

We agree that the views of business are important, but also believe it is essential to take account of the views of those that regulation is designed to protect. HSE believes that through its work with unions and other representative bodies, and input from HSC Commissioners, it takes account of these issues. How LBRO will demonstrate it is taking full account of the views of those that regulation is designed to protect (particularly how it will take account of the views of trades unions) merits further development.

The document asks for views on three questions.

A. Do you share our understanding of the problems facing local regulation and local authority regulatory services?

HSE agrees that achieving consistent levels of enforcement across the country is essential. We recognise that some criticisms have been raised by nationally-operating businesses suggesting that LAs do not always adopt consistent approaches on health and safety issues.

It cannot be denied that inconsistency does exist. Mechanisms to coordinate approaches to multi-site businesses are welcome. However, there is a danger that suggestions of inconsistency are overstated. The perception of multi-site businesses that regulators are inconsistent may also reflect a failure on the part of those businesses to recognise that the circumstances of specific regulatory interventions may be different, and that their own performance is not uniform from location to location.

It must also be recognised that some activity is driven by perceived local priorities. The expressed aim of LBRO to raise the level of awareness of the value of effective regulation within local authorities is welcome. The extent to which progress is made in this area will vary across authorities. There is the possibility that raised awareness will raise the level of enforcement by some LAs. This could lead to further complaints of inconsistency when in

fact it is a reaction to conditions requiring action and represents a proportionate response to the identified risk.

B. Will the three objectives we intend to focus on effectively deliver LBRO's mission to secure the effective performance of local authority regulatory services in accordance with the better regulation principles?

HSE supports the approach based upon proportionality, accountability, consistency, transparency and targeting. This approach has long been part of HSC/E's Enforcement Policy Statement, which also binds LAs (though it may have local expression). HSE has also developed an Enforcement Management Model (EMM) to assist its inspectors and LA inspectors to make appropriate decisions on enforcement action depending on the circumstances of any identified failure to meet a legal requirement. HSE encourages all LAs making regulatory decisions on health and safety issues to apply this model and would be happy to work with LBRO should these principles be seen as helpful in other regulatory areas.

The introduction of Local Area Agreements may provide a mechanism for focussing attention on the regulatory performance of LAs and the value this brings to the community. How the developing strategy might influence this new area merits consideration.

Objective - Support service improvement and change in local authority regulatory services: HSE agrees that an effective system of sharing knowledge about businesses between regulators could add significant value and assist a coordinated approach targeted at particular activities of particular businesses on the basis of shared intelligence. HSE, with the involvement of LACORS has a current major project looking at improving intelligence and the targeting that flows from it, and this will include the question of more sharing of information.

However, HSE's general experience in these areas is that significant efforts will be needed to ensure that inspectors of whatever discipline gather and record information and judgements about a company's performance in a consistent way. This is in addition to the IT challenge of developing an effective mechanism to process and share this information. The resource implication, both in terms of time and IT costs, is likely to be considerable and should be assessed carefully.

HSE supports an evidence-based approach to service planning. HSE believes its development of enforcement priorities and targeting of particular activities and dutyholders supports this approach. LAs have responded well to adopting this approach to their health and safety regulation. The burden of identifying overall priorities in consultation with stakeholders and others (including LAs) should fall to the national regulator.

The effective and proportionate use of enforcement powers which may lead to sanctions, as set out in its Enforcement Policy Statement (EPS), is a fundamental part of HSC/E's approach and the approach it works to achieve with LAs, but it is only a part of this activity. HSC/E define enforcement widely as the whole range of targeted and proportionate interventions with duty holders to secure action to manage risk, achieve sustained compliance with the law and bring alleged offenders to account before the courts. As part of this range, enforcement action leading to sanctions is an important lever, but the majority of intervention to motivate change comes via the advice on compliance given to

businesses at inspections or similar meetings. HSE believes this area is not given sufficient weight in the strategy.

Many health and safety failures can be remedied by an enforcement notice (Immediate Prohibition of an activity or, Improvement, requiring that a failure or failures to comply with stated statutory provisions is/are rectified within a set timescale). Notices provide a proportionate and effective response to failure which must be addressed, but where prosecution is not warranted. Neither of these processes will lead directly to any penalty, a penalty can only be levied, via a court, in the event that the business fails to comply with the notice (which is in itself an offence) and the enforcing authority prosecutes. This process is also subject to an appeals process that allows the business to challenge the validity of any notice.

It is worth noting that, businesses frequently perceive the receipt of a notice as a penalty, when in reality a notice is simply a requirement to take action to comply with existing law. However, it is also possible to prosecute as well as serve a notice where the breach is significant and a penalty is justified.

HSE and LAs may also instigate prosecutions when they discover significant breaches of the law. Both investigate complaints, accidents and cases of ill health. Where these investigations reveal serious breaches of the law, they may bring the offender to court as part of administering the justice system. Any penalty imposed is a matter for the court, not the regulator. The Government and HSC/E have long held that penalties awarded for health and safety offences are, on average, too low to represent a proportionate response to offences and provide an effective deterrent. This view has been reinforced by the findings of the Hampton and Macrory reviews. HSE has worked in a variety of ways to encourage more proportionate sentencing by the courts and welcomes the Health and Safety (Offences Bill) which Keith Hill MP has introduced with Government support, with the aim of giving the courts stiffer sentencing options for most health and safety offences. LBRO should consider if it should have a role in working with the justice system to assist courts in a consistent approach to sentencing.

Given the broad range of interventions available to Health and Safety regulators, including local authorities, from advice to formal enforcement, the Health and Safety Commission does not judge it appropriate, at the present time to recommend Ministers enact Macrory sanctions for health and safety enforcement. Accordingly, the question of appropriate advice to LAs on their adoption is not an issue where health and safety enforcement is concerned.

Objective - Directly deliver consistency principally through primary authority schemes: HSE has made significant efforts to coordinate approaches across LA-enforced businesses through Local Authority Partnership Schemes (LAPS) and its Large Organisation Partnership Pilot (LOPP). Our experience indicates that these schemes can be effective in encouraging a strategic approach to improving health and safety standards by influencing both the approach of the company and by better coordination of the approach of the regulator.

Experience has also shown that any LA taking the lead in any primary authority arrangement needs support in terms of both technical expertise in the initial establishment of the arrangements and resources to support the administrative burden. They also need the cooperation from their colleagues in other authorities.

LBRO should consider the level at which it wishes to intervene. It may have a role in setting the general approaches that should be taken in establishing and maintaining any primary authority scheme. The responsibility for setting the technical standards that should be applied lead to legal compliance should be set by the existing national regulators. This will facilitate consistency of both approach and the technical standards applied in any given circumstance.

HSE is already working with LBRO on these issues and is keen to share its learning.

HSE also believes that ensuring consistency in the regulation of SMEs is essential and that the developing strategy should give greater weight to achieving this. In particular, further consideration should be given to the balance between making information available to SMEs via mail shots, websites, advertising and representative bodies and using direct contacts (inspections) to judge performance and encourage compliance. Of course, the current review of the H&S landscape by BRE is addressing issues of duty-holder risk and performance, particularly related to SMEs, and their conclusions will contribute to the debate on this point.

Objective - Act to improve the local authority regulatory services system more generally: Developing a complete model of the regulatory landscape will be helpful in identifying common themes shared across different regulators and should assist in the development of common approaches. A common database of all business premises could assist efficiency and the targeting of effort, but there would be challenges in keeping it current.

However, HSE believes that attempting to rate “management competence” or some similar descriptor of the performance of a business that applies across a number of regulatory areas (e.g. trading standards, health and safety and environment) is too simplistic. Businesses perform in areas where profit is generated, the owner or directors have particular interest or their clients demand high performance. Good performance in one area cannot be relied upon as an indicator in another aspect of the business (e.g. tax returns v health and safety).

The role the provision of information and guidance provided to business plays in the regulatory system also deserves greater consideration in developing the strategic approach. Has LBRO developed a view on whether the majority of the information and guidance should be delivered via national schemes driven by the national regulators or devolved to LAs? HSE believes to maximise consistency in the technical standards promulgated and efficiency in providing this information the material should be made available via the national regulator. As far as possible the same information should be available to the regulators and the regulated. HSE has adopted this approach with its “Fit 3 street” on its website. This contains the standards that should be applied to the control of priority areas and the evidence base that informed the development of standards and approaches. How information and guidance should be made available should be clarified within the strategy. Again, the current BRE review is relevant.

For example, HSE is using its website as a source of example risk assessments for SMEs. This clarifies what is expected of business and provides a solid template for tailoring to their specific needs by individual businesses. This has been a significant step towards

making sure the messages received by business are consistent and can be applied by them with the minimum of disruption and the least input from the regulator.

C. Are the activities outlined under the core objectives sufficient to achieve that mission and contribute towards improving economic prosperity and community wellbeing?

There are opportunities for further valuable work in ensuring a more consistent approach through the development of coherent and transparent mechanisms for identifying the relative resource requirements of different areas of regulation – another issue being considered by the BRE review. HSE provides guidance to LAs on how to judge if they are devoting adequate resources and suitably competent staff to health and safety regulation. However, there is little guidance to assist LAs in establishing the balance between the resource applied to health and safety and other areas of regulation. HSE has been told that LAs tend to devote resource to different regulatory topics dependant upon the penalties exacted by the national regulator if their targets are not delivered rather than in proportion to the benefit they believe their interventions could achieve. A mechanism to assist LAs in coming to a decision on the relative resourcing to be applied to different areas of regulation proportionate to the benefit likely to accrue from the balance of activities should be developed.

In this regard HSE has found that LACORS is able to take a useful across the board view of regulatory activity and LBRO should seek to engage LACORS in this work.

The Roger's report dealt with national regulatory priorities. We support this concept and consider that the strategy could address how this aspect might be developed further.

The current strategy proposals are based upon driving LAs to deliver better regulatory performance by raising awareness of the benefits of better regulation within the LA community. HSE believes that undertaking similar work with those that are regulated will also be beneficial in ensuring acceptance of the need for regulation, what it aims to achieve and the societal benefit that accrues. Further benefit can be derived from explaining more clearly to business what they should expect of local regulators. By setting a clearer standard, businesses will be able to judge if they are being regulated appropriately and apply pressure for better performance locally.

Whilst being clear that regulation has benefits for business the role of regulators within the system for the administration of justice is underplayed in the strategy. Even well-performing businesses fail and where failures are serious and damage to individuals results, the role of the regulator can be to ensure the business is called to account at a court. The strategy should clarify that this is a clear role in regulation.

HSE also understands that some LAs are unwilling to prosecute some serious offences against medium-sized and larger employers because of the difficult in funding legal proceedings in the higher courts and the potential costs should a prosecution fail and costs be awarded against the authority. If true this could mean justice was not being fully discharged. LBRO should consider if it can provide a system that ensures a consistent approach (and funding where necessary) across all LAs.

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