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## HEALTH AND SAFETY COMMISSION

### Better Regulation Executive (BRE)- Macrory Penalties Review Consultation Document: *Regulatory Justice – Sanctioning in a post-Hampton World*

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#### Issue

1. To provide a response to the Better Regulation Executive's (BRE) Macrory Penalties Review consultation entitled 'Regulatory Justice – sanctioning in a post-Hampton World.' The consultation document analyses UK penalties practice, and proposes a number of options for reform. HSE has a mature enforcement regime with no significant gaps in powers. So the review is an opportunity to consider whether, and if so how, we might wish to supplement our current powers.

#### Timing

2. BRE has asked for initial responses by 18<sup>th</sup> August 2006.

#### Recommendation

3. That HSC\E continues to engage and influence options put forward in this vital area. It is therefore suggested that the Commission agrees –
  - (i) The draft letter (Annex 3) from the Chair to the BRE (Macrory Penalties Review Team).
  - (ii) Response to The BRE Consultation – Broad Analysis – Annex 4.
  - (iii) Response to The BRE Consultation – Answers to Specific Questions – Annex 5.

#### Background

4. The Hampton Review recommended that the BRE should undertake a comprehensive review of Regulators' penalty regimes. BRE established a Penalties Review under the guidance of Prof. Richard Macrory, Professor of Law at University College, London. The terms of reference for the review were to set out general principles for effective enforcement; and to consider -
  - how sanctions can be changed to ensure that they act as an effective deterrent and eliminate all of the economic benefits of non-compliance;
  - how administrative penalties might best be used to eliminate economic gains and speed up the penalty process;
  - how measures can be taken to enhance consistency between and within penalty regimes;
  - the role of alternative sanctions for regulatory offences such as restitutive and restorative justice;
  - whether there is a role for a regulatory tribunal in the regulatory system; and
  - To make general recommendations on the use of regulatory penalties and specific recommendations for change where that is thought appropriate.
5. The principles set out by the review are generally in line with HSC's enforcement policy statement principles. Health and safety regulation already provides a variety of enforcement tools which meet many of the objectives of the review.
6. It is important to point out our understanding of the proposed process, which does not impose a time limit on adopting any options. Although the BRE are intending to place an enabling clause on alternative penalties, in an as yet unconfirmed Bill, it is expected the enabling clause will have little or no detail. Instructions for parliamentary counsel were due to have been sent by the end of June. Pre-legislative scrutiny is expected to take place in November. Once the enabling powers are in place, the expectation is that **regulators will work within their own timeframes to develop any secondary legislation**. This will set out the relevant details of how the regulator intends to use the chosen penalties. Given the timeframe it is therefore unlikely that **any alternative penalties would be in place before 2008**.

## Argument

7. The review poses no threat to HSC's existing enforcement strategy. It proposes in principle a set of penalties and a framework for applying penalties that HSC/E can welcome and which would not impose changes in the way we work (Annex 1). As part of Macrory's vision, the use of criminal prosecutions would remain appropriate for serious breaches where there was evidence of intentional or reckless flouting of the law, whether by an individual or a business. How current regulatory tools are used and applied would not be affected. The principles of using any new alternative penalties will be set out in the proposed Compliance Code, details of which are still being worked on.
8. The review recognises that it is important for Regulators to have sanctioning tools available to enable them to ensure the protection of workers, consumers and the environment. Throughout our discussion with BRE, HSE have sought to stress that proposals for change should avoid imposing uniform or rigid penalty structures on Regulators. We have emphasised in our dealings with BRE that comparisons of penalties used across Regulators are not always valid, and it is important to compare

like with like, taking into account the ultimate aim and context in which the Regulator operates. For health and safety breaches this would include death, injury and ill health.

9. It is envisaged that there will be no compulsion on the Regulator to adopt any new alternative penalty proposed. The intention is to allow the Regulator to choose, if any, the best fit alternative penalty tool(s) for their regime. Any alternative penalty would need to be in addition, and not an alternative, to existing powers.
10. Prior to adopting any additional tool it is important that existing tools should be utilised to their fullest extent and that higher fines are imposed in the current health and safety penalty system.
11. HSE already achieves the associated benefits that are proposed in the review i.e. Improvement and Prohibition Notices. Nevertheless, the Strategic Enabling Programme on Enforcement (STEP) is looking at efficiencies in the way in which we conduct investigations and bring prosecutions. The findings from STEP will be factored into any decision on adopting alternative penalties. In addition, this exercise provides a valuable opportunity to **work with local authorities in considering how we can ensure greater consistency**, in the deployment of both current and any new penalties, **across all** health and safety enforcing authorities.
12. Any new tool would have to meet HSC's purpose of enforcement –
  - to ensure immediate action is taken to deal with serious risks;
  - to promote and achieve sustained compliance;
  - to ensure failing duty holders may be held to account;
13. In addition we want to ensure the following criteria are met -
  - to allow flexibility of choice and discretion currently used in the enforcement process;
  - is not overly complicated or bureaucratic for the regulator or the regulated;
  - is a process that is fair, clear and transparent to all and;
  - centrally funded and with guidelines where appropriate to help ensure consistency.
14. The review proposes elements for reform of the penalties system (Annex 2). It is positive that the review states that the use of criminal prosecution should be maintained where there is evidence of intentional or reckless behaviour or where the actual or potential consequences are so serious that the public interest demands a criminal prosecution.
  - i. **Administrative Penalties**  
Greater use of administrative sanctions with a right to appeal or go to court
  - ii. **Statutory Notices**

As part of their enforcement tools HSE and local authorities already use Improvement and Prohibition Notices. The review proposes that they should be strengthened by ensuring regulators follow them up. The review also suggests the use of other notices -

- a) Enforceable Undertaking(EU) – Legally binding agreement.
- b) Undertaking Plus - EU plus a fine

**iii. Restorative Justice**

A conference and process to ensure that the needs of victims are addressed.

**iv. Proposals for Court Applied Penalties**

(1) Increase effectiveness of sanctioning regulatory non-compliance and concentrate certain prosecution in certain courts.

- a) Corporate Rehabilitation orders
- b) Community projects
- c) Publicity Orders
- d) Conditional cautions for corporate offenders
- e) Mandatory Audits

(2) Maximum level of penalties should be reviewed.

15. In light of extensive internal consideration and external consultation with stakeholders, and taking in to account that mentioned previously, perhaps the most worthy of consideration would be enforceable undertakings and restorative justice as these deal with victims and financial gain respectively. On the same basis those regulatory tools which allow the administration of fines are not particularly attractive due to their potential costly and bureaucratic nature.

16. The covering letter in Annex 3 highlights particularly –

- i. the importance of the related work with the Compliance Code.
- ii. the Commission, as the body with responsibility for health and safety in Great Britain, to decide with others such as the office of the Rail Regulator, what if any, penalties to adopt under health and safety legislation.
- iii. that all penalties should apply equally across Great Britain.
- iv. addressing the current low level of fines would go a long way to improving compliance.

A draft general response to the consultation examining the key issues for HSC is provided in Annex 4. Specific draft detailed answers to questions posed in the review are set out in Annex 5.

## **Consultation**

17. HSE has been able to draw views on the proposals on behalf of the Commission via - a website discussion page for stakeholders; internal HSE meetings and seminar; bilaterals with key external stakeholder partners and from an external stakeholder seminar. Stakeholders that have been consulted include – TUC, CBI, IOD, EEF, CCA, Hazards, local authorities and LACORS.

## **Presentation**

18. Further interest in this issue is expected at a later date when alternative penalty options have been finalised following the BRE review report.

## **Costs and Benefits**

19. There would have to be detailed cost and benefit analysis to justify any new options set down in secondary legislation. Any decision to adopt new proposals would have to ensure that current enforcement and prosecution activity to achieve our programme and PSA targets were not adversely affected.

## **Financial/Resource Implications for HSE**

20. It is too early to determine any future financial costs to HSE. Future financial/resource implications will be calculated once further progress has been made by the BRE. At present work in progress expenditure is approximately £8000.

## **Environmental Implications**

21. N/A at present.

## **Other Implications**

22. None.

## **Action**

23. To agree the recommendations in paragraph 3 and draft response summarised in para 15.