

Broad Analysis of Review

Overall we agree with the principles and proposals of the review. HSC's enforcement authorities operate in diverse areas of the private and public sectors and within a wide spectrum of risk, which includes high hazard environments. We believe our current health and safety regime has no distinct enforcement gap. Under the current health and safety system we operate an effective enforcement toolkit, which has a range of options including notices. These tools are used in a flexible, proportionate nature that is transparent and consistent in accordance with our enforcement guidelines.

However, we believe all regulators, including HSE and Local Authorities, would benefit from a flexible toolkit consistent with the risk-based approach to regulation. It is clear that any options that could add to the regulator's enforcement toolbox and help the judiciary meet regulatory objectives to improve sustained compliance would be beneficial. It is also fair to say that any options taken forward would have to be specifically considered by each regulator and should ensure that a transparent, fair and proportionate response to a breach is obtained. In the case of health and safety any consideration of new tools would have to be in the context of our existing enforcement policy criteria –

- Deal with immediate risk
- hold failing duty holders to account and
- ensure long-term compliance with the law

We would also want to ensure that any new tools would –

- allow for flexibility of choice and discretion currently used in the enforcement process
- are not overly complicated or bureaucratic for the regulator or the regulated
- contribute to a process that was fair, clear and transparent to all and;
- centrally funded and with guidelines where appropriate

It is accepted that HSE operates at a higher hazard end of the regulatory spectrum and that because of this, and our current enforcement tools, comparison with other regulators is not always appropriate.

It is also important that any final options are fit for purpose and take account of the needs of victims. All options should allow or assist regulators to deal proportionately, effectively and efficiently with any 'rogue' element of business to create a level playing field.

The following is a synopsis of the main penalty options we have considered -

(1) Monetary Administrative Fines

HSC sees both advantages and disadvantages with Monetary Administrative Fines (MAPS).

Pros

Fixed fines for minor offences are an area where there is a possibility of benefit. This type of penalty could also allow a dedicated team separate to that of enforcement to collect and issue the fines.

Cons

Arguably, any form of fixed penalty notice may not act as a disincentive to business. Business could well calculate the financial gains of non-compliance against that of the potential penalty. It may also damage the long term perception and relationship of HSE and LAs with those they regulate due to its revenue collection nature.

A MAP system may well change some duty holder's behaviour and save court time but there is also a great risk of both the fixed and variable fines process posing a large cost and bureaucratic burden to the regulator. 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.

Possible Uses

Fixed fines for minor offences where there has been a breach of welfare provision or where there has been a failure to notify a reportable accident.

(2) Enforceable Undertakings

The Commission sees many potential benefits with Enforceable Undertakings (EU). Any EU should be backed up by the ability of enforcement, including prosecution, following non-compliance.

Pros

EU's may work well not only as an alternative sanction but also an additional sanction to our current regulatory tools. Improvement Notices currently cover a range of attributes EU may provide, including behavioral change. We particularly see the benefit of EU's in the context of reparation especially 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.

Cons

Additional resource will be needed to monitor an EU.

Possible Uses

Coupled with a Prohibition Notice to deal with the immediate risk, an EU could be used to agree e.g. a national management improvement program for health and safety coupled with rehabilitation programs for individuals affected by the breach.

(3) Restorative Justice

Restorative Justice (RJ) provides a framework to proportionately match the breach as well as allowing for reparation. RJ should not be a substitute for prosecution but may well benefit our current regulatory regime as a pre court option prior to prosecution.

Pros

It would be particularly useful in involving and meeting the needs of victims e.g. rehabilitation, workers retraining, reassurance and support, closure and public support. RJ may well result in improvements in health and safety outcomes in businesses as well as educate the organisation and managers. An RJ conference allows for transparency with justice seeing to be done and acts as a good vehicle to show the breach and subsequent agreement to the workforce and business. We see RJ being most effective where breaches have resulted in large community risk and in the public sector.

Cons

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 and guidelines. 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.

Possible Uses

Breaches involving the community e.g. a loss of contaminant which did not have serious consequences but, which exposed a community to unacceptable risk. It may also be particularly useful in the public sector where fines could be

replaced by actions and agreements which does not transfer money from the public services but which punishes organisations in an effective manner.

(4) Probation of Companies And Directors

Any probation of an organisation or an individual director may well have a positive effect in achieving compliance. Probation of companies and directors would need further consideration. Any cost of monitoring compliance should not fall to the regulator.

Pros

As well as the fear of enforcement additional measures imposed by the market e.g. increase in insurance liability premiums, may well help to achieve sustained compliance in the long term.

Cons

In reality the complex nature of placing a legal entity or individual on probation may prove difficult to monitor and enforce due to e.g. the ability of an organisation to change its name and operation and for directors to move on. This may also involve a lot of resource.

Possible Uses

Probation of a company and/or directors following a series of relatively minor accidents across the organisation. The regulator had given advice on several occasions but no improvement had been made.

(5) Publicity Orders

Publicity orders would be a complementary tool to assist in improving levels of sustained compliance.

Pros

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 being considered.

Cons

Considerable resource would be needed on guidelines and drafting. While we as regulators already have the power to name and shame, publicity orders may well be a complimentary tool to assist sustained compliance if ordered by the Court.

Possible Uses

Adverse publicity order accompanying a fine against a large multinational company with a high reputation.

Conclusion

Apart from the regulatory options we also find the proposal to review the maximum level of penalties for criminal offences highly desirable and agree that **finances handed down by courts should aim to eliminate the financial gain** made as a result of regulatory non-compliance. These issues should be addressed in co-ordinated manner with all regulators.

What we would not want to see is a set of new regulatory tools, which each regulator would be compelled to use and implement within a given timescale. Any tools available should be open to the regulator to adopt at the most appropriate time they see best. We would equally not want to see options which overall create an additional bureaucratic burden or which are confusing in their nature to the regulator and/or the regulated. Options proposed, such as restorative justice, would need a centralised government framework in place prior to any adoption and should ideally be supported by government guidance.

Whilst we are encouraged at the prospect of potentially new enforcement tools to assist us in ensuring compliance of health and safety, further consideration by the Commission and its enforcing authorities would have to be given to any firm proposals. Given the structure and diversity of our regulatory remit we would have to examine any potential option suggested to ensure it - (i) fitted in with our current regulatory framework; (ii) met and assisted with our aims in our enforcement policy criteria and (iii) added 'real value' to the existing tools and regime. Extensive consultation with stakeholders would also have to occur.