

Health and Safety Commission Paper		HSC/07/54	
Meeting Date:	17 July 2007	Open Gov. Status:	Fully open
Type of Paper:	Above the line	Paper File Ref:	
Exemptions:	None		

HEALTH AND SAFETY COMMISSION

Cabinet Office consultation on draft Regulatory Enforcement and Sanctions Bill - HSC response

A paper by Allan Davies and Steve Woolley

Advisor(s): Phil Scott, Giles Denham

Cleared by Jonathan Rees on xx June 2007

Issue

1. To provide a response to the Cabinet Office Better Regulation Executive (BRE) consultation¹ on the draft Regulatory Enforcement and Sanctions (RES) Bill.

Timing

2. Consultation closes on 15 August 2007. The Government intend to publish a response to this consultation exercise by 28 September 2007.

Recommendation

3. The Commission is invited to:
 - i. note the proposals for the draft RES Bill and invitation to comment;
 - ii. note that HSE will continue to engage with BRE on this important area; and
 - iii. agree a reply to BRE consisting of the letter at Annex 1.

Background

4. The RES Bill is a further element of the Government's commitment to implement the Hampton agenda. The 2005 Hampton Review, *Reducing administrative burdens: effective inspection and enforcement* highlighted the importance of proportionate and risk-based approaches to enforcing regulations, and the associated benefits in delivering better outcomes on the ground. In particular, Hampton found that while there is much good practice in UK regulation, there remained a lack of effective priority setting by central government, lack of national coordination between government departments and local regulators and lack of consistency in risk assessment and enforcement amongst local authorities (LAs).

¹ Consultation on the Regulatory Enforcement and Sanctions draft Bill, available on the Cabinet Office website: http://www.cabinetoffice.gov.uk/regulation/documents/consultation/pdf/res_bill.pdf

Hampton also found that regulatory penalty regimes are often cumbersome and ineffective. The RES Bill seeks to advance Hampton's vision of a regulatory system, at both a national and local level, that is risk-based, consistent, proportionate and effective.

5. The RES Bill is comprised of two distinct parts:

- **Local Better Regulation Office**

Part 1 of the Bill establishes the Local Better Regulation Office (LBRO) as a statutory corporation and enables LBRO's transition from its current status as a private company. The legislation will give LBRO five core functions – set out in Annex 2 - to support its key aim of securing more effective and less burdensome approaches to the way in which regulations are enforced by LAs. Its remit would initially extend to LA functions for trading standards and environmental health but scope has not been finalised and could extend further.

- **Sanctions toolkit**

Part 2 of the Bill implements recommendations in the Macrory Review, *Regulatory Justice: Making Sanctions Effective*. It will give Ministers powers to enable Hampton-compliant regulators to impose **fixed monetary penalties**, and impose **discretionary requirements** - including **variable monetary penalties** - by means of notices (see Annex 2 for further detail). Regulators need not take up the option of these additional penalties if they do not consider it appropriate to do so.

Argument

6. The Commission can generally welcome the intention behind these developments though, as set out in the draft letter, there are still a number of key issues (similarly highlighted by LACORS) to resolve to ensure LBRO add value and deliver practical solutions so as to improve the regulatory regime. If the Commission agrees, HSE will pursue these with BRE during and after the consultation period. Some of the key issues are highlighted below.

7. Part 1 of the Bill (LBRO) extends to England and Wales only. Part 2 of the Bill (Sanctions toolkit) extends across the whole UK. There are implications for HSC in managing its GB wide responsibility for health and safety and seeking consistency of enforcement across GB when LAs might be directed differently between England/Wales and Scotland. This may also be a particular concern for GB wide business.

LBRO

8. HSC were updated on LBRO in MISC/07/08 and MISC/06/27. LBRO's proposed powers include tackling inconsistency of environmental health and trading standards departments in enforcement. A key proposal is to create a scheme based upon the Home/Lead Authority Principle called the Primary Authority Principle which will have a statutory basis. LBRO will administer the scheme

giving any multi site business the right to partner with an LA. LBRO will arbitrate in the event of any disagreement between an enforcing LA wanting to take enforcement action and the partner LA, with LBRO's decision final. The implication is that LBRO could block enforcement action though there is an exemption "where there is an imminent risk of serious harm to human health or the environment." There are clearly potential implications for HSE, for example, where there's a dispute over enforcement action or where HSE plan enforcement action against a business with a Lead Authority Partnership scheme in place.

9. LBRO will be empowered to issue statutory guidance to LAs in respect of regulatory services. This may overlap with HSC's statutory duty to produce guidance to local authorities (s.18 HSW Act) and we will need to ensure we work together to ensure consistency. It is not yet clear what role LBRO will have in monitoring LA performance.
10. In the longer term LBRO will be the body that reviews and revises, at least every three years, the national priorities for local authority regulatory services. LBRO's approach to determining national regulatory priorities will follow that of the Rogers review setting out five priorities (including health at work) for local regulatory services. Further work will be necessary to ensure that health and safety receives appropriate priority in the future.
11. HSE aims to promote to LBRO its experience of working in partnership with LAs to improve delivery, and welcomes the opportunity to work with LBRO on clear mechanisms and appropriate guidance. On delivery, much of the discussion of reform needed in LA regulation assumes a current way of working which is based on planned proactive inspections carried out at a set frequency irrespective of the record of compliance.

Sanctions

12. HSC considered and replied in detail to the Macrory consultation in August 2006 (see HSC/06/30) and considered his final report along with the outcome of the Enforcement Policy Statement evaluation (HSC/06/78) at its meeting in January 2007. On both occasions HSC confirmed:
 - **Before looking at new penalties** there is a need to ensure the level of fines imposed under current penalties act as an effective deterrent: current levels are too low (as Macrory himself found).
 - Overall, HSC welcomed the review, but HSE's work on this topic, including its own public discussion as part of the EPS evaluation, showed that the health and safety regime was mature with **no significant gaps in its powers**. HSE and LAs already effectively enforce the legislation without being driven to excessive use of prosecution through lack of alternatives;
13. While it is anticipated that HSE will not need to take on any of the new penalties at present, it will be necessary to review the position in the light of future developments. For example, potential outcomes from the Hampton

Implementation Review (report likely to be published early 2008; see HSC/07/55), mergers with other regulators etc.

14. We understand LAs now take the view that there may be cases where additional sanctions would be useful - when notices may not be appropriate but prosecution would be seen as disproportionate. HSE will enter into early discussion with the Local Authorities Coordinators of Regulatory Services (LACoRS) to explore this view.
15. On penalties, HSE is working with DWP to explore options to take forward the commitment to raise penalty levels. This follows the recent failure of Wayne David MP's government supported private members bill. The sentencing Guidelines Panel are planning to consult later this year on guidelines for cases involving the new offence of corporate manslaughter. This will be widened to cover HSWA cases involving work-related death.
16. HSC 's response to the consultation can therefore confirm
 - that HSE's enforcement options are currently sufficient, and
 - it has no comments to make on Part 2 of the Bill.

Consultation

17. HSE has had close contact with BRE on the development of these proposals. LACORS will respond separately but we understand their views on LBRO are similar to those expressed here but with a differing position on the sanctions proposals, as outlined above.

Presentation

18. The proposed response is in line with HSC/E's stance as a modern and Hampton-compliant regulator.

Costs and Benefits

19. The costs and benefits for this proposal are covered in BRE's Impact Assessment in the consultation document. BRE has assessed the **total cost** of the changes to be **£478.2M** (over a 15 year period), incurred mainly by business, with **total benefits** – again mainly to business - of **£1670.6M**.

Financial/Resource Implications for HSE

20. There will be general continuing and future liaison between HSE and BRE/LBRO with additional liaison necessary on enforcement issues within the Primary Authority Principle – but much will depend on the systems developed. None anticipated with Part 2 (sanctions) of the Bill. Minor staff costs to date for handling proposal – not quantified.

Action

21. To agree a response to BRE broadly welcoming the Regulatory Enforcement and Sanctions draft Bill.

Dear

I am writing with the views of the Health and Safety Commission (HSC) in response to your consultation on the draft Regulatory Enforcement and Sanctions Bill. The Commission welcomes the opportunity to comment on this important development in the UK regulatory regime.

In developing its focus as a modern regulator, the Commission is committed to ensuring its approach to regulation is more effective and efficient, both for those regulated and the regulators. We have welcomed the work done by both Sir Philip Hampton and Professor Richard Macrory and the Government's acceptance of their findings.

We look forward to working with the Local Better Regulation Office (LBRO) – many of LBRO's objectives chime with HSE's objectives such as the maintenance of worker and public protection, setting priorities based on risk, and turning burdens into enablers for business success. We are pleased at the positive relationship HSE is developing with LBRO and HSE intends to be proactive in contributing to LBRO's work, as it moves towards statutory status. In particular, we support the development of systems that are practical and give value in return for investment by all concerned.

On scope, HSC welcomes the opportunities for more coordinated and focused local delivery arising from LBRO's overview of trading standards and environmental health services. HSE is conscious of the link between LA delivery of regulatory services and the delivery of directly managed services by central government. HSE will work closely with LBRO to mirror developments in LA best practice in its own approach wherever this is appropriate.

We recognise that inconsistency of enforcement by local authorities is not best served by inconsistent and uncoordinated messages given by central government. The Commission welcomes the focus on establishing a framework to establish priorities for LAs and is committed to working with other regulators to find relevant common ground.

HSE has, in particular, worked with local authorities and their representatives over the last three years developing a closer working relationship. Communication and understanding have been greatly improved and both HSE and local authorities are now engaged in joint planning and working arrangements with common objectives designed to deliver our priorities. This partnership approach brings together the strengths of both local and central regulators aimed at bringing about a more effective result matching HSE's ethos of "partnership as the way we do out business".

The consultation raises a number of important issues which will need to be considered further during the progress towards establishment of the LBRO. For example:

- Ensuring that, in reviewing and revising the Rogers priorities, LBRO and HSE officials work together to ensure consistency with HSC's strategy of targeting and directing LA inspection to our priorities.

- Ensuring that the Primary Authority Principle and HSC's Enforcement Policy Statement (plus HSE's associated Enforcement Management Model) are together jointly effective in the operation of enforcement action by an inspecting authority.
- We are keen to ensure that enforcement of health and safety is consistent across Great Britain, not just across England and Wales as set out in Part 1 of the draft Bill.
- Working together to ensure there's consistency between HSC's guidance to local authorities issued under Section 18 of the Health and Safety at Work etc Act 1974 and LBRO guidance to local authorities.

We value the dialogue to date between BRE and HSE on the establishment of LBRO and look forward to this continuing with the common aim of improving the regulatory framework.

Our own work on the topic of alternative penalties, including public discussion as part of the recent evaluation of our Enforcement Policy Statement, showed that the health and safety regime was mature with no significant gaps in its powers. HSE and LAs already effectively enforce the legislation without being driven to excessive use of prosecution through lack of alternatives.

With regard to LA enforcing authorities, we understand that there are differing views on whether additional sanctioning options could be appropriate. HSE will enter into discussion with the Local Authorities Coordinators of Regulatory Services (LACoRS) to explore this. We understand LACoRS will be responding to your consultation separately.

Prosecution is carefully targeted at cases where it is warranted to serve the interests of justice, and send a strong signal to deter others. Professor Macrory found that current penalties appear too low to effectively deter and, in line with that, our main priority in the area of sanctioning remains to see an increased deterrent effect through the availability of stiffer sentences under the current regime.

We therefore have no comments on this Part of the Bill.

SUMMARY PROVISIONS FOR PARTS 1 AND 2 OF THE DRAFT REGULATORY ENFORCEMENT AND SANCTIONS BILL

PART 1 OF THE BILL: LBRO

Part 1 of the Bill proposes that LBRO has five key functions:

- Improving the coordination and consistency of regulatory functions and enforcement through the Primary Authority Principle, resolving disputes when they arise;
- Issuing guidance to local authorities in respect of regulatory services;
- Reviewing and revising a list of national priorities for local authority regulatory services;
- Providing advice to Government on enforcement and regulatory issues associated with local government; and
- Encouraging best practice, and innovative approaches to the provision of local authority regulatory services, including through the use of its programme budget.

In exercising its functions LBRO has the objective of securing that local authorities exercise their relevant functions: effectively; in a way which does not give rise to unnecessary burdens; and in a way which has regard to the following principles:

- Regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent;
- Regulatory activities should be targeted only at cases in which action is needed.

PART 2 OF THE BILL: REGULATORY SANCTIONS

Part 2 of the Bill implements recommendations in the Macrory Report. It will give Ministers powers to enable regulators:

- to impose **fixed monetary penalties**, according to a procedure laid down in the Bill;
- to impose **discretionary requirements** by means of notices - these may specify:
 - **variable monetary penalties;**
 - **steps to secure non-compliant acts or omissions do not continue or recur; and**
 - **steps to secure that matters are restored to the condition before the non-compliant act or omission**, according to a procedure laid down in the Bill;

and also to accept **voluntary undertakings** in place of, or in addition to, requiring payment of a variable monetary penalty

- to issue notices requiring **permanent cessation of activity** that presents a significant risk of harm to human health or the environment;
- to issue notices requiring **temporary cessation of activity** that presents a significant risk of harm to human health, the environment, or the financial interests of consumers;
- to accept **enforcement undertakings** specifying actions which include: securing acts or omissions are not repeated or continued, the position is restored, and which benefit those affected by the acts or omissions.

It also provides guidance as to use of these powers.